
NAVAL LAW REVIEW

ARTICLES

BEYOND ARM BANDS AND ARMS BANNED: Chaplains, Armed Conflict, and the Law

Lieutenant Jonathan G. Odom, JAGC, USN

MILITARY COMMISSIONS: A Legal and Appropriate Means of Trying Suspected Terrorists

Melvin Heard, Esq., LT Robert P. Monahan, JAGC, USN, William Ryan, Esq., and E. Page Wilkins, Esq.

THE DOMESTIC IMPLICATIONS OF ENVIRONMENTAL STEWARD SHIP AT OVERSEAS INSTALLATIONS: A Look at Domestic Questions Raised by the United States' Overseas Environmental Policies

Lieutenant James E. Landis, JAGC, USN

CHAPLAINS CAUGHT IN THE MIDDLE: The Military's "Absolute" Penitent-Clergy Privilege Meets State "Mandatory" Child Abuse Reporting Laws

Lieutenant Shane D. Cooper, JAGC, USN

ECO-JUSTICE AND THE MILITARY IN INDIAN COUNTRY: The Synergy Between Environmental Justice and the Federal Trust Doctrine

Lieutenant Commander William J. Dunaway, JAGC, USN



VOL. 49



2002

Report Documentation Page			Form Approved OMB No. 0704-0188		
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 2002	2. REPORT TYPE		3. DATES COVERED 00-00-2002 to 00-00-2002		
4. TITLE AND SUBTITLE Naval Law Review. Volume 49			5a. CONTRACT NUMBER		
			5b. GRANT NUMBER		
			5c. PROGRAM ELEMENT NUMBER		
6. AUTHOR(S)			5d. PROJECT NUMBER		
			5e. TASK NUMBER		
			5f. WORK UNIT NUMBER		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Justice School, 360 Elliot Street, Newport, RI, 02841-1523			8. PERFORMING ORGANIZATION REPORT NUMBER		
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)			10. SPONSOR/MONITOR'S ACRONYM(S)		
			11. SPONSOR/MONITOR'S REPORT NUMBER(S)		
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 232	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

NAVAL LAW REVIEW

Judge Advocate General of the Navy
Rear Admiral Michael F. Lohr, JAGC, USN

Commanding Officer, Naval Justice School
Captain Dennis G. Bengtson, JAGC, USN

Editor
Lieutenant De Andrea G. Fuller, JAGC, USN
Lieutenant Peter D. Galindez, JAGC, USN

Associate Editor
Lieutenant Commander Ann Minami, JAGC, USN

Managing Editor
Major George Cadwalader, USMC

Editorial Board
Lieutenant Commander Ann Minami, JAGC, USN
Lieutenant Commander Edward O'Brien, JAGC, USN
Lieutenant Robert Passerello, JAGC, USN

Published by the Naval Justice School, the NAVAL LAW REVIEW encourages frank discussion of relevant legislative, administrative, and judicial developments in military and related fields of law.

Views expressed in published articles must be considered solely those of individual authors and do not purport to voice the views of the Naval Justice School, the Judge Advocate General, the Department of the Navy, or any other Agency or Department of the United States.

The NAVAL LAW REVIEW is published from appropriated funds by authority of the Judge Advocate General in accordance with Navy Publications and Printing Regulations P-35.

This issue of the NAVAL LAW REVIEW may be cited as 49 NAVAL L. REV. [page number] (2002).

INFORMATION FOR AUTHORS

Authors are invited to discuss prospective articles with the NAVAL LAW REVIEW, editor at (401) 841-3808 ext. 140 or DSN 948-3808 ext. 140 or by writing to Editor, NAVAL LAW REVIEW, Naval Justice School, 360 Elliot Street, Newport, RI 02841-1523.

The editor, in conjunction with article editors, carefully reviews each manuscript for clarity, accuracy, and scholarly merit. The editor reserves the right to make editorial changes to a manuscript selected for publication. Manuscripts will not normally be altered in a manner inconsistent with the substance of the author's position. Where practical, the board will notify the author of any substantive changes before publication. There are no specific guidelines on manuscript length: brevity is not an obstacle to publication of a quality manuscript.

Manuscripts must be typed. The author should also submit a disk in WordPerfect or Microsoft Word compatible format. Authors should include an abstract of the proposed article, a short biography, and a statement as to whether the manuscript has been submitted elsewhere for publication. Per current directives, authors are solely responsible for security review. Authors may take a different position from that held by the government; when the author purports to state the views of the Department of the Navy or another governmental entity, however, security review is essential to ensure that the official position is stated accurately. No compensation can be paid for any articles published.

Articles should conform to the current edition of *A Uniform System of Citation* (17th ed.) and *Military Citation* (7th ed.). Authors should consult the *United States Government Printing Office Style Manual* (rev. ed. 1984), on matters not addressed in *A Uniform System of Citation* (the "Bluebook").

Peter D. Galindez
DeAndrea G. Fuller
Lieutenants,
Judge Advocate General's Corps
U.S. Navy
Editors

SUBSCRIPTIONS

Subscription information may be obtained by writing to the Managing Editor, NAVAL LAW REVIEW, Naval Justice School, 360 Elliot Street, Newport, RI 02841-1523. Publication exchange subscriptions are available to organizations that publish legal periodicals.

INDIVIDUAL PURCHASES

Individual copies of the NAVAL LAW REVIEW, formerly titled the *JAG Journal*, may be purchased by contacting the Defense Technical Information Center (DTIC) and the National Technical Information Service (NTIS) for republication and sale. Copies are not available from the Naval Justice School.

Commands not already registered with the DTIC may obtain registration forms and information on ordering publications by writing to:

Defense Technical Information Center
Attention: Code DTIC-FDRA
Cameron Station, Building 5
Alexandria, VA 22304-6145

COMM (703) 767-8273
DSN 427-8273
1-800-CAL-DTIC (225-3842)

Individual purchasers may obtain information on ordering publications by writing to:

U.S. Department of Commerce
National Technical Information Service
5285 Port Royal Road
Springfield, VA 22161

An alternative means of obtaining the NAVAL LAW REVIEW is by downloading it from the Naval Justice School Web Page at <http://www.jag.navy.mil/html/njs.htm>.

CONTENTS

Articles

Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law	1
--	---

Lieutenant Jonathan G. Odom, JAGC, USN

Military Commissions: A Legal and Appropriate Means of Trying Suspected Terrorists.....	71
---	----

Melvin Heard, Esq., LT Robert P. Monahan, JAGC, USN, William Ryan, Esq., and E. Page Wilkins, Esq.

The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States' Overseas Environmental Policies.....	99
--	----

Lieutenant James E. Landis, JAGC, USN

Chaplains Caught In the Middle: The Military's "Absolute" Penitent-Clergy Privilege Meets State "Mandatory" Child Abuse Reporting Laws.....	128
---	-----

Lieutenant Shane D. Cooper, JAGC, USN

Eco-Justice and the Military in Indian Country: The Synergy Between Environmental Justice and the Federal Trust Doctrine	160
--	-----

Lieutenant Commander William J. Dunaway, JAGC, USN

Book Reviews

Is Jihad A Just War? War, Peace, and Human Rights Under Islamic and Public International Law	220
--	-----

Lieutenant Commander Gregory P. Noone, JAGC, USNR

Military Brats and Other Global Nomads: Growing Up In Organizational Families.....	227
--	-----

Dr. Diana C. Noone

BEYOND ARM BANDS AND ARMS BANNED: CHAPLAINS, ARMED CONFLICT, AND THE LAW

Lieutenant Jonathan G. Odom, JAGC, USN^{*}

I. Introduction

In Herman Wouk's novel of law and war *The Caine Mutiny*, the protagonist, young Ensign Willie Keith, fretted over his limited role in the battles of World War II. During his deployment aboard the old rusty *USS Caine*, his father wrote him a letter with comforting words to a young man who wanted to see action and fight the good fight. Particularly, he told his son, "It's your way of fighting the war."¹ In this current time of global war, every member of our nation's military has his or her special role in the effort. Clearly, these responsibilities are as diverse as the people who carry out those duties. Just as the jobs of these service members differ within their ranks, so too does their respective status within the relevant battlespace. This article will address the unique status and treatment of one of those special groups within the armed forces of any nation, including the United States—that is, military chaplains.

The familiar phrase "foxhole religion" reminds us that faith is often on the minds of fighting forces.² In fact, U.S. military doctrine for chaplains recognizes that "[m]any ministry opportunities derive from a close proximity to combat action."³ Consequently, such doctrine further "encourages the concentrating of ministry efforts in forward combat areas."⁴ Chaplains and their assistants are encouraged to serve "near at hand during battle," but not "in the

^{*} The positions and opinions expressed in this article are those of the author and do not represent the views of the United States Government, the Department of Defense, or the United States Navy. Lieutenant Odom (A.B., Duke University, 1993; J.D., Wake Forest University School of Law, 1996), is an active-duty Navy judge advocate, presently serving as an Instructor at Naval Justice School, where he teaches operational law, including the law of armed conflict. As part of those duties, he regularly teaches the law of armed conflict to chaplains at the Naval Chaplains School. The author would like to thank his wife Missy for her tireless patience and understanding during the long hours of research and writing this article. The author would also like to thank Lieutenant W. Dan Stallard, CHC, USN, Lieutenant Commander Christopher J. Corvo, JAGC, USN, and Lieutenant Commander Edward B. O'Brien, JAGC, USN, for reviewing and editing this article.

¹ HERMAN WOUK, *THE CAINE MUTINY* 58 (Doubleday & Company 1951).

² Jonathan Finer and Peter Baker, *In Kuwait, Baptism Before the Gunfire: Faced With Threat of War in Iraq, Many Marines Turn to Religion*, WASHINGTON POST (28 February 2003), at A01.

³ DEPARTMENT OF THE NAVY, FLEET MARINE FORCE MANUAL 3-61, MINISTRY IN COMBAT (22 June 1992), ¶ 2002g [hereinafter FMFM 3-61].

⁴ *Id.*

midst of battle.”⁵ Seizing upon such opportunities, however, is not without its risk, nor can it always be so neatly compartmentalized. When ministry meets combat, issues of multiple disciplines arise – including issues of law.

All is not truly fair in love and war.⁶ Throughout history, rules have developed which dictate the acceptable limits on how a war may be fought. Likewise, much guidance has been written about these rules of warfare. Certain service publications have provided a chapter by chapter overview of certain aspects of the law of armed conflict,⁷ while others have provided a cohesive analysis of the applicable international conventions.⁸ Still other publications or articles have been written about the special status, treatment and responsibilities of certain categories of unique personnel, such as medical personnel,⁹ civilians,¹⁰ government contractors,¹¹ and others. One such group entitled to special status and treatment under the rules of warfare is military chaplains. However, unlike some of the other groups, such as medical personnel, no such legal publication has recently¹² addressed the specific, unique nature of men and women of the cloth who find themselves in the midst of war. The primary goal of this article is to provide a comprehensive, up-to-date examination of the special legal status, treatment, benefits and responsibilities of chaplains who serve their God and their nation in the midst of armed conflict.

Section II of this article will focus upon the legal status of chaplains in armed conflict: first, the basic law of armed conflict; then, the historical role of chaplains in the U.S. military and how that role has dramatically changed through our nation’s history. Thereafter, the analysis will shift to the actual status of all nations’ military chaplains under international law, primarily under the Geneva Conventions of 1949. Next, the article will highlight two of the methods of

⁵ *Id.*

⁶ EDWARD SMEDLEY, FRANK FAIRLEIGH (1850) (“All’s fair in love and war.”); JOHN LYLY, EUPHUES (1578) (“The rules of fair play do not apply in love and war.”)

⁷ See, e.g., DEPARTMENT OF THE NAVY, NAVAL DOCTRINE COMMAND, NWP 1-14M, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (October 1995); DEPARTMENT OF THE ARMY, THE JUDGE ADVOCATE GENERAL’S SCHOOL OF THE ARMY, OPERATIONAL LAW HANDBOOK (2003) [hereinafter OPERATIONAL LAW HANDBOOK].

⁸ See, e.g., DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956) [hereinafter FM 27-10].

⁹ See, e.g., Christopher T. Cline, *Medical Operations and the Law of War*, MILITARY REVIEW (April 1991); Bruce T. Smith, *Air Force Medical Personnel and the Law of Armed Conflict*, 37 A.F. L. REV. 239 (1994); ALMA BACCINO-ASTRADA, *MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS* (International Committee of the Red Cross 1982).

¹⁰ See, e.g., Lisa L. Turner and Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001).

¹¹ See, e.g., Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon*, 51 A.F. L. REV. 111 (2001).

¹² L.B. Watson, *Status of Medical and Religious Personnel in International Law*, 20 JAG Journal 41 (1965).

distinction established in the Conventions for setting chaplains apart on the battlefield. Finally, the policy restrictions adopted by the U.S. armed services for the purpose of protecting the status of U.S. chaplains will be examined.

Section III of this article will focus upon the legal treatment of chaplains in armed conflict. First, the discussion will explore the standard of treatment of chaplains in the battlespace. The remainder of this section will examine the standard of treatment of chaplains upon capture, primarily in prisoner of war camps, to include an explanation of the duration of any such retention. Additionally, it will highlight how chaplains are entitled to prisoner-of-war benefits, but are also subject to internal discipline systems of the detention camp. The focus will then shift to the performance of chaplains' spiritual duties in camp, including the special facilities guaranteed in the Conventions to help perform those duties. Finally, examination will shift to the U.S. Code of Conduct and its application to U.S. chaplains retained by the enemy.

Section IV of this article will focus upon the domestic role of U.S. chaplains in armed conflict. Prior to considering the multiple roles, each chaplain must fully understand the status and treatment standards adopted by the U.S. armed forces to implement the obligations under the Geneva Conventions. Thereafter, scrutiny will shift to the three key roles developed for U.S. chaplains in U.S. detention facilities: advisors to camp commanders; ministers to enemy detainees; and conduits between the two interests. Finally, the article will explore a potential conflict of interest arising in the performance of the roles involving the penitent-clergy communication privilege. Throughout the examination of these domestic roles, international law obligations, domestic policy guidance, and the practical application of both by U.S. chaplains recently assigned to Camp X-ray in Guantanamo Bay, Cuba, will be highlighted.

II. Legal Status of Chaplains in Armed Conflict

A. Basic Concepts of the Law of Armed Conflict

The law of armed conflict (often referred to as "LOAC") is a body of international law that addresses the various rules for conducting warfare. As with other areas of international law, this body of law is derived from a variety of sources within two general categories: conventional law and customary international law.¹³ Conventional law refers to international treaties, conventions and agreements that have been entered by multiple nations through established procedures. Customary international law refers to principles which have developed through time and practice of nations, but which may not necessarily be codified in any particular signed agreement.

¹³ FM 27-10, *supra* note 8, ¶4 at 4.

LOAC addresses the rules of war from several different angles. Namely, LOAC defines who and what may be targeted in periods of armed conflict, how individuals may be treated in periods of armed conflict, what types of weapons may be used in armed conflict, what tactics may be employed in armed conflict, and how all of these rules may be enforced. Most of these legal guidelines under LOAC are intended to promote one of four broad principles: necessity,¹⁴ proportionality,¹⁵ humanity,¹⁶ and distinction.¹⁷ For chaplains, a great deal of the focus in understanding their special status and treatment is derived from the fourth principle of distinction.

The LOAC principle of distinction—sometimes referred to as discrimination—is one of the few positive types of discrimination in the world. In short, armed forces are expected to distinguish between certain categories of individuals and treat these groups differently based upon the respective categories. For the sake of clarity, the key distinction for individuals is between combatants and noncombatants.¹⁸ Combatants are those individuals directly engaged in the fight, while noncombatants are individuals who are not engaged in the fight. While such simple definitions might appear to suggest all military forces are combatants and all civilians are noncombatants, this body of LOAC is not so simplistic. To be sure, uniformed Soldiers and Sailors who are engaged in armed conflict are combatants and the average civilian is a noncombatant. These individuals, however, are not the only individuals who are combatants or noncombatants. For example, a civilian who takes up arms against the enemy may potentially become a combatant—in such cases, an “unlawful combatant.”¹⁹ On the other hand, certain uniformed personnel are not combatants, even though they are wearing military uniforms. This noncombatant status may be due to one of

¹⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) [hereinafter GC IV] (Article 147 states: “Grave breaches [of the Convention]...shall be those involving...extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”), in DOCUMENTS ON THE LAWS OF WAR 299, 352 (Adam Roberts and Richard Guelff eds., 3rd ed. 2001) [hereinafter DOCUMENTS ON LOW].

¹⁵ FM 27-10, *supra* note 8, ¶41 at 19 (“[L]oss of life and damage to property must not be out of proportion to the military advantage to be changed.”)

¹⁶ Annexed Regulations to Hague Convention IV Respecting the Laws and Customs of War on Land (18 October 1907) [hereinafter HR IV] (Article 23(e) states: “It is especially forbidden...to employ arms, projectiles, or material calculated to cause unnecessary suffering.”), in DOCUMENTS ON LOW, *supra* note 14, at 77.

¹⁷ Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) [hereinafter GC III] (Article 4 states: “Prisoners of war...are.... [m]embers of the armed forces of a Party...having a fixed distinctive sign recognizable at a distance.”), in DOCUMENTS ON LOW, *supra* note 14, at 246.

¹⁸ HR IV, *supra* note 16, at 73 (Article 3 states: “The armed forces of the belligerent parties may consist of combatants and non-combatants.”).

¹⁹ *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) (“By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.”).

several criteria—either because of their responsibilities (e.g., doctors and chaplains) or because of their condition in the fight (e.g., prisoners of war and wounded soldiers).

The legal status of an individual dictates the legal treatment to which he or she is entitled under LOAC. Generally, this treatment falls into three categories: targeting, criminality, and detention. For example, a combatant can be targeted in the fight, cannot be prosecuted for participating in the fight (except for war crimes), and must be afforded prisoner-of-war benefits if detained in the fight (e.g., after surrender or capture). On the other hand, noncombatants cannot be targeted in the fight, can be prosecuted for participating in the fight, and must be afforded some different treatment if detained in the fight.

With this general background of LOAC, let us consider the details of the historical role and legal status of chaplains in the armed conflict environment.

B. Historical Role of Military Chaplains

Men (and, more recently, women) of the cloth have not always been the blessed “peacemakers”²⁰ of the battlefield. The first half of our nation’s military history constituted a true soul-searching of what should be the role of chaplains within our armed forces, ranging from whether chaplains should wear military uniforms to whether they should be armed and join in the fight.²¹ In the decades leading up to the Civil War, chaplains within the ranks were expected to assume various secular duties, to include: teaching the troops; providing medical treatment to the sick and wounded; administering field hospitals; serving as unit postmasters; organizing shipboard libraries; taking charge of unit recreation programs; and supervising the commander’s mess.²² In conflicts such as the Revolutionary War and the War of 1812, individual chaplains were recognized for their heroic efforts in battle, efforts that included actively participating in the fight.²³ Much of their thrill for the fight might have been attributed to the fact that

²⁰ Matthew 5:9 (“Blessed are the peacemakers, for they shall be called sons of God”).

²¹ RICHARD M. BUDD, *SERVING TWO MASTERS: THE DEVELOPMENT OF AMERICAN MILITARY CHAPLAINCY* (Univ. of Nebraska Press, Lincoln, 2002).

²² *Id.* at 18-20, 48-51.

²³ *Id.* at 21 (“In numerous instances both army and navy chaplains personally took part in fighting. While some pastors, like Lutheran John Peter Gabriel Muhlenberg, forsook their clerical status to become line officers, many saw no conflict in assuming the combat role as a chaplain. John Steele, the 1756 commander of Fort Allison, Pennsylvania, also served as its chaplain and was addressed as ‘Reverend Captain.’ Massachusetts minister William Emerson of Concord carried a musket in the fight against the British in 1775. Chaplain David Jones, armed with a brace of pistols, led a cavalry reconnaissance at Brandywine Creek. John Hurt, captured on an intelligence-gathering mission for Baron von Steuben, was another chaplain who basically operated in a combatant role.

Many navy chaplains were also at the forefront of battle. Benjamin Balch, who was a minuteman at Lexington, served as chaplain on the frigate *Alliance* later in the war and fought alongside the crew in a

many of the early chaplains were not ordained ministers, but rather clerks or schoolmasters who accepted the unit chaplain title for its boosted payscale.²⁴

Through the years, however, the image of the “fighting parson” lessened. In 1782, Congress declared that the enemy’s chaplains, surgeons, and hospital officers should not be considered prisoners of war. The U.S. Navy mandated, unofficially in 1823 and officially in the 1841, General Regulations that all chaplains must first be ordained ministers.²⁵ Despite the move towards a professional chaplaincy, individual chaplains continued to hold various combatant roles during the Civil War, ranging from serving as the regimental colonel’s aide-de-camp, to gathering intelligence with their chaplain status as a cover, to assuming their place in the ranks and trading shots with the enemy.²⁶ Consequently, a significant number of military chaplains for both sides lost their lives in the war—some surely engaged as combatants.²⁷

fight with two British men-of-war. Combat participation by navy chaplains continued on several occasions during the War of 1812. Chaplain David Adams on board the frigate *Essex* was given command of three different captured prize vessels because of his knowledge of navigation and because of the shortage of line officers. Thomas Breeze, chaplain with Commodore Oliver Perry Hazard at the battle at Put-in-Bay, helped the purser and Perry fire the last gun on the *Lawrence*.”).

²⁴ *Id.* at 21.

²⁵ *Id.*

²⁶ *Id.* at 54-55 (“The extent of chaplain participation in combat existed on a continuum from quasi-staff work to firing a weapon on the battlefield. A common role for chaplains was to act as the regimental colonel’s aide-de-camp. Future president James A. Garfield’s chaplain acted in this role at the fight at Middle Creek, Kentucky, in 1862, and he was regularly included in the regimental staff meetings. The same was true for Chaplain Dean Wright of the Seventh OVI, who acted in that capacity at Port Republic, Virginia, that same year. Chaplain Denison, who volunteered to be his colonel’s aide, found that during battle he was unable to perform his duties ministering to the wounded because ‘the Colonel always wished me by his side.’ At least three southern chaplains served in this same capacity.

Next, there were chaplains who performed the even more dubious function of carrying or seeking military information, using their chaplain status as a cover. Frederick T. Brown, also of the Seventh OVI and ‘disguised as a mountaineer in homespun clothing, his fine features shaded by a slouch hat,’ carried unwritten dispatches to General Jacob Cox. James H. Fowler, chaplain of the Thirty-third U.S. Colored Troops, was described by his colonel as ‘our most untiring scout’ and as being ‘permitted to stray singly where no other officer would have been allowed to go, so irresistible his appeal, ‘You know I am only a chaplain.’....Apparently at least one Confederate chaplain, William M. Patterson of the Sixth Missouri Infantry Regiment, also crossed the line and engaged in both spying and running contraband goods when he was supposed to be buying Bibles.

The ultimate combatant role for the chaplain, of course, was actually to stand with the troops and fire a weapon. Some went to war prepared for such an eventuality. His fellow ministers gave a Rhode Island chaplain named Jameson a sword as a present on the occasion of his leaving for the battlefields. Wearing his sword and pistol, Chaplain Denison saw no reason for chaplains not to be armed like surgeons and quartermasters. ‘If [chaplains] exhort men to fight,’ Denison said, ‘why not fight themselves, if they have a chance?’ Apparently, some chaplains did take their place in the ranks and trade shots with the enemy. It was said of Thomas D. Witherspoon, a southern chaplain, that he had his commission only on the grounds that he could fight in the ranks with the rest of his regiment. Chaplain Henry Hopkins of the 120th New York Infantry Regiment was better known for his martial ardor than for his spiritual qualities; he received the Medal of Honor for his battlefield valor.”)

²⁷ *Id.* at 54-55 (“Of thirty-six Union chaplains who died in service, fourteen were killed in battle. Twenty-five Confederate chaplains died in the war, and thirteen were slain in battle. While it is

Eventually, the military leadership of the Union and the Confederacy began to adjust the status of military chaplains. In the summer of 1862, Confederate and Union Generals signed reciprocal orders releasing enemy chaplains captured in the war.²⁸ This trend towards noncombatancy, however, slowed in 1863 when two Confederate chaplains allegedly assisted in the escape of two prisoners of war.²⁹ After both sides temporarily suspended the release of chaplains, they eventually resumed the practice in the fall of 1864. Thereafter, the military chaplain's role in armed conflict was changed forever. American chaplains would never again be involved as armed combatants "except for isolated and unsanctioned incidents."³⁰

At the same time, the domestic legal history of the U.S. Civil War significantly influenced the development of the international law of armed conflict. Particularly, President Lincoln issued General Order No. 100, commonly known as the "Lieber Code" in honor of its chief draftsman, Dr. Francis Lieber.³¹ A veteran of Napoleonic European warfare and thereafter a Professor of Law at Columbia University, Dr. Lieber had urged President Lincoln and the Union military leadership to set boundaries for what their troops should be legally permitted to do on the battlefield.³² In turn, President Lincoln appointed Dr. Lieber to a committee with four general officers to draft "a code of regulations for the government of armies in the field, as authorized by the laws and usages of war."³³ Upon the code's completion, President Lincoln approved and promulgated it to Union forces on 24 April 1863.³⁴ The Lieber Code is now commonly recognized as "the first attempt to check the whole conduct of armies by precise written rules,"³⁵ which carried influence beyond the battles and borders of the U.S. Civil War.

As the Lieber Code is the general precursor for the modern body of LOAC, the code also specifically injected terms and concepts into the legal framework concerning chaplains and their status on the battlefield. Specifically, Article 52 of the Lieber Code stated:

impossible to determine exactly how many of those who were killed in battle were actually engaged as combatants (some were officially listed as taking part in the fighting themselves), the most generous estimate would be that not more than half were themselves bearing arms.")

²⁸ *Id.* at 56.

²⁹ *Id.* at 57.

³⁰ *Id.*

³¹ Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 192 (2000).

³² Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L. L. 213, 214-215 (April 1998).

³³ *Id.* at 215.

³⁴ *Id.*

³⁵ *Id.*

The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.³⁶

Notice the Lieber Code's early use of the term "retain," as well as the concept of chaplains and medical personnel deserving some special status other than that of prisoners of war. Such terms and concepts regarding chaplains will become more familiar as we examine how this area of LOAC developed to the present.

C. Status Under International Law

At about the same time as the U.S. Civil War, the status of chaplains in armed conflict was being refined under international law. In 1864, an international convention was drafted and signed which first recognized the noncombatant status of chaplains.³⁷ Specifically, Article 2 of the agreement declared that: "Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality, whilst so employed, and so long as there remain any wounded to bring in or to succor." The preceding article in that same convention further clarified the benefits of the neutrality of such persons and places, in that they "shall be protected and respected by belligerents" as long as they are not misused. This codified agreement³⁸ was the precursor of the Geneva Conventions of 1929 and, ultimately, the four Geneva Conventions of 1949—which currently serve as the primary legal standard for status and treatment of persons on the battlefield.

Under the Geneva Conventions of 1949, persons on the battlefield are categorized as either combatants or noncombatants. Combatants can be legally targeted, but they are also legally protected in certain ways. If attaining this status is so important, the question is begged: Who exactly is a combatant? As a general

³⁶ GENERAL ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (24 April 1863) *in* THE LAW OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS [hereinafter DOCUMENTS ON LOAC]1, 11 (Dietrich Schindler and Jiri Toman eds., 2nd ed. 1981).

³⁷ Geneva Convention for the Amelioration of the Condition of the Wounded on the Field of Battle (22 August 1864), *in* DOCUMENTS ON LOAC, *supra* note 26, 213.

³⁸ The United States did not become a signatory of the 1864 Geneva Convention until 1882. BUDD, *supra* note 21, at 57.

rule, the category known as combatants includes a member of the armed forces of a party to the armed conflict who satisfies four pre-requisites: (1) the person's unit is "commanded by a person responsible for his subordinates"; (2) the person has "a fixed distinctive sign recognizable at a distance"; (3) the person is "carrying arms openly"; and (4) the person's unit is "conducting their operations in accordance with the laws and customs of war."³⁹ As a practical matter, almost every member of a nation's armed forces—ranging from a rifleman to a fighter pilot—will easily satisfy these four pre-requisites in an armed conflict.

At the same time, however, the 1949 Conventions recognize several special groups within a nation's armed forces who are entitled to different status. More specifically, chaplains and medical personnel are legally entitled to special status. Generally, such personnel shall be "respected and protected,"⁴⁰ regardless of whether they are located on land⁴¹ or at sea.⁴²

As a matter of history, the drafters of the 1949 Conventions recognized the historical origins of the special status afforded to medical personnel and chaplains. As with medical personnel, chaplains "are often called upon to give help of a more material nature to the wounded on the battlefield."⁴³ Consistently,

³⁹ GC III, *supra* note 17, art. 4.

⁴⁰ For a discussion of what constitutes "respect" and "protect," see discussion *infra* IIIA.

⁴¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) (hereinafter GC I) (Article 24 states: "Medical personnel exclusively engaged in the search for, or the collection, transport, or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.") in DOCUMENTS ON LOW, *supra* note 14.

⁴² Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (12 August 1949) (hereinafter GC II) (Article 37 states: "The religious, medical and hospital personnel assigned to the medical and spiritual care of [members of a nation's armed forces who are wounded, sick, and shipwrecked at sea] shall, if they fall into the hands of enemy, be respected and protected....") in DOCUMENTS ON LOW, *supra* note 14.

⁴³ JEAN S. PICTET, COMMENTARY TO GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (International Committee of the Red Cross 1952) (hereinafter COMMENTARY TO GC I) at 219. Immediately after the convened nations approved the text of the four Geneva Conventions of 1949, the International Committee of the Red Cross decided to memorialize a detailed commentary to those texts. *Id.* at 7. A reader of those commentaries should realize that they are not binding. Ultimately, only consultative agreements between the signatory nations serve as the "authentic" controlling interpretation of the conventions. However, the signatories have not routinely entered such interpretative agreements. *Id.* Consequently, the Commentators stated in their foreword:

The International Committee hopes that this Commentary will be of service to all who, in Governments, armed forces, and National Red Cross Societies, are called upon to assume responsibility in applying the Conventions, and to all, military and civilians, for whose benefit this study it will help to make the Conventions widely known – for that is essential to be effective – and to spread the influence of their principles throughout the world.

Id. at 8.

through agreements between commanders of armies in military history, chaplains have been placed on an equal footing with medical personnel for such privileged status.⁴⁴

As a matter of principle, two of the guiding LOAC principles—humanity and necessity—are promoted by giving special status to medical personnel and chaplains. With the principle of humanity, chaplains are able to “[bring] the solace of religion and moral consolation” to the wounded and dying, where they are “present at the last moments of men who have been mortally wounded.”⁴⁵ With the principle of necessity, no reasonable basis exists for allowing enemy forces to target a chaplain who finds himself on the battlefield for the sole purpose of providing spiritual comfort to the wounded and dying.

With these historical origins and LOAC principles in mind, it is important to recognize the delicate nature of this special status afforded to chaplains and the corresponding need to preserve that special status. In the heat of battle and the fog of war, all individuals—including chaplains—wearing enemy uniforms and located in the vicinity of known enemy combatants could easily be construed as legitimate targets. As a result of this inevitable situation and the potential confusion, the drafters of the Geneva Convention recognized that all doubt or risk of mistaken identity should be avoided or reduced.

Several methods of distinction were incorporated into LOAC to help protect chaplains. The most significant method of distinction is the actual conduct of the individual. Consequently, the drafters declared that “[t]o be entitled to immunity, [chaplains] must be employed exclusively on specific...religious duties.”⁴⁶ Moreover, chaplains “must obviously abstain from all hostile acts.”⁴⁷ Actions with the potential to jeopardize this special status include “any form of participation—even indirect—in hostile acts.”⁴⁸ While these strongly-worded discussions by the commentators were not codified within the actual text of the convention, their interpretative value helps explain the need for the absolutist perspective of our military’s policy regarding arming chaplains, which will be discussed *infra* in Part E.

D. Methods of Distinction

Much of the discussion surrounding chaplains focuses on what they shall not do in armed conflict. The 1949 Conventions, however, balance those

⁴⁴ *Id.*

⁴⁵ *Id.* at 219-220.

⁴⁶ COMMENTARY TO GC I, *supra* note 43, at 218.

⁴⁷ *Id.* at 220.

⁴⁸ *Id.* at 221.

restrictions with certain safeguards to minimize the risk to chaplains. These permitted actions serve to enhance the principle of distinction. Such distinction is enhanced primarily by arm bands and special identification cards, both permitted under conventional law.

1. Arm Bands

Chaplains serving in armed conflict are permitted to wear arm bands that distinguish them from the rest of their respective unit. Under the 1949 Conventions, chaplains and medical personnel “shall” wear such an arm band or, to use terminology of the Conventions, an “armlet.”⁴⁹ This arm band must be worn on the chaplain’s left arm. The conventions use the term “affixed,” to signify the importance that these protected persons not take it off and put it on again at will.⁵⁰ While this arm band should be water-resistant to maintain its “good condition,” the lack of that trait does not negate its “protective value.”⁵¹

Additionally, the band must be issued and stamped by the military authority of that chaplain’s armed forces.⁵² The name of the military authority must appear on the stamp.⁵³ Because the stamp is issued by an official military authority, it attaches a senior officer’s “responsibility” to the consideration and decision of issuing each such arm band to a deserving individual.⁵⁴ One conceptual thread running throughout the Geneva Conventions is ensuring overall compliance with LOAC by holding individual servicemembers, as well as their commanders, accountable for any violations of the law.⁵⁵ Consequently, the existence of the issuing stamp on the arm band is truly critical—not merely a formality—and its absence will cause the arm band to have “no protective value.”⁵⁶

More importantly, the arm band must bear “the distinctive emblem,”⁵⁷ as the “visible sign of immunity.”⁵⁸ Under international law, the “distinctive emblem” on these arm bands can vary depending upon the religious faith of the chaplain. The most commonly recognized emblem is the red cross on a white background.⁵⁹ While such crosses may at first glance be assumed to reflect the Christian faith, the 1949 Conventions specifically state the origin of this emblem

⁴⁹ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁵⁰ COMMENTARY TO GC I, *supra* note 43, at 310.

⁵¹ *Id.*

⁵² GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁵³ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁵⁴ COMMENTARY TO GC I, *supra* note 43, at 311.

⁵⁵ For example, one of the four criteria of a lawful combatant is that the individual serves “under a responsible command.” GC III, *supra* note 17, art. 4.

⁵⁶ COMMENTARY TO GC I, *supra* note 43, at 311.

⁵⁷ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁵⁸ COMMENTARY TO GC I, *supra* note 43, at 11.

⁵⁹ GC I, *supra* note 41, art. 38; GC II, *supra* note 42, art. 41.

as “a compliment to Switzerland.”⁶⁰ Switzerland, of course, was the homeland of businessman Henry Dunant, who witnessed the horrors of war at the Battle of Solferino in 1859. He subsequently responded by founding the International Committee of the Red Cross in Geneva.⁶¹ He and his organization were chiefly responsible for the inaugural Geneva Convention of 1864,⁶² referenced *infra* Section IIC, and successive international agreements. In order to eliminate “any national association,” the colors of the Swiss flag were reversed.⁶³

While the red cross was intended to be religiously neutral, its unintended impact resulted in other distinctive emblems being recognized. In the negotiations over the series of Geneva Conventions, the International Committee for the Red Cross consistently sought to adopt a single emblem in order to avoid any confusion⁶⁴ among the belligerents in a conflict. They viewed the red cross as an “international sign” that was “devoid of any religious significance.”⁶⁵ Several nations, however, expressed contrary reservations about using the red cross as it was “offensive to Moslem soldiers.”⁶⁶ As such, Turkey indicated its intent to use the red crescent. Siam (Thailand) indicated its intent to use the red flame. Persia (Iran) indicated its intent to use the red sun.⁶⁷ Thereafter, several Muslim nations adopted the red crescent.⁶⁸ Ultimately, the parties agreed to permit the use of several distinctive symbols.

In addition to the red cross, other protective symbols have gradually been permitted either under the conventions or via customary international law. The 1949 Conventions specifically recognize several other emblems, including the red crescent on white background, as well as the red lion and sun on white background.⁶⁹ Additionally, other emblems have been recognized as a matter of custom through the years. For example, Israel employs a red six-pointed star, symbolizing the Star of David.⁷⁰ The U.S. does not formally recognize this symbol as a matter of international law, and the Star has never been adopted in any international convention. Nations involved in Arab-Israeli conflicts, however,

⁶⁰ GC I, *supra* note 41, art. 38; GC II, *supra* note 42, art. 41.

⁶¹ Noone, *supra* note 31, at 191.

⁶² COMMENTARY TO GC I, *supra* note 43, at 11.

⁶³ *Id.* at 305.

⁶⁴ *Id.* at 309.

⁶⁵ *Id.*

⁶⁶ *Id.* at 298.

⁶⁷ *Id.* at 299.

⁶⁸ *Id.*

⁶⁹ GC I, *supra* note 41, arts. 38 and 41; Note that Iran has ceased using the red lion and sun, and now employs the red crescent. OCEANS LAW AND POLICY DEPARTMENT, NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (1997) (hereinafter ANNOTATED SUPPLEMENT) ¶ 11.9.1, at 11-16.

⁷⁰ ANNOTATED SUPPLEMENT, *supra* note 69, ¶ 11.9.1, at 11-17.

have customarily recognized the Star as a protective emblem as a matter of practice.⁷¹

To a certain extent, the U.S. armed forces have incorporated the use of arm bands into their respective uniform regulations. The Army refers to them as “brassards.”⁷² Generally, such brassards may be worn “as identification to designate personnel who are required to perform a special task or to deal with the public.”⁷³ The Army Regulation further describes the specifications and dimensions of such brassards.⁷⁴ Army personnel must wear any authorized brassards “on the left sleeve of the outer garment.”⁷⁵

The Army Regulation specifically addresses the wearing of the “Geneva Convention brassard.”⁷⁶ It describes the color scheme of such brassards,⁷⁷ and provides a visual diagram of that color scheme.⁷⁸ The regulation also specifies who is permitted to wear one, as well as when they may wear it.⁷⁹ Of note, such brassards may be worn by “chaplains attached to the armed forces.”⁸⁰

In contrast to the Army Regulation, the Navy Uniform Regulations are less detailed in their discussion of arm bands. Like the Army, the Navy refers to them as “brassards.”⁸¹ The Navy defines them as “cloth bands, marked with symbols, letters or words, indicating a type of temporary duty, to which the wearer is assigned.”⁸² The only other guidance that these uniform regulations provide regarding brassards concerns the appropriate location on the Navy uniform. Specifically, Naval personnel should wear such brassards “on the right arm, midway between the shoulder and elbow, on uniforms or outer garments.”⁸³

⁷¹ *Id.*

⁷² DEPARTMENT OF THE ARMY, ARMY REGULATION 670-1, UNIFORMS AND INSIGNIAS: WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (1 July 2002) [hereinafter AR 670-1], ¶ 28-29.

⁷³ *Id.*

⁷⁴ *Id.* (“Brassards are made of cloth; they are 17 to 20 inches long and 4 inches wide and of colors specified. When more than one color is specified for the brassard, the colors are of equal width and run lengthwise on the brassard.”)

⁷⁵ *Id.* (“Brassards are worn on the left sleeve of the outer garment, with the bottom edge of the brassard approximately 2 inches above the elbow.”)

⁷⁶ AR 670-1, *supra* note 72, ¶ 28-29(b)(7).

⁷⁷ *Id.* (“The brassard consists of a red Geneva cross on a white background.”)

⁷⁸ *Id.*, Figure 28-160.

⁷⁹ *Id.*, ¶ 28-29(b)(7) (“Medical personnel wear the brassard, subject to the direction of competent military authority. When the brassard is worn, personnel are exclusively engaged in the search for, collection, transport, or treatment of the wounded or sick; or in the prevention of disease. The brassard is also worn by staff exclusively engaged in the administration of medical units and establishments, and it is worn by chaplains attached the armed forces.”)

⁸⁰ *Id.*

⁸¹ DEPARTMENT OF THE NAVY, BUREAU OF NAVAL PERSONNEL, UNITED STATES NAVY UNIFORM REGULATIONS, NAVPERS 156651, art. 5402(1).

⁸² *Id.*

⁸³ *Id.*, art. 5402(2).

Upon review, the Navy Uniform Regulations appears to have several deficiencies. Unlike the Army Regulation, there is no particular discussion of the specifications or dimensions of red cross arm bands, nor is there information delineating who is permitted to wear them. Ironically, with only two sentences of guidance in the Navy Uniform Regulations concerning brassards, one of the two sentences is actually inconsistent with the Geneva Conventions. While the Geneva Conventions mandate that such arm bands be worn on the chaplain's left arm, the Navy Uniform Regulations generally dictate that armbands shall be worn on the right arm. Consequently, U.S. Navy authorities should consider revising this uniform regulation to make it consistent with international law.

2. Special Identity Cards

In addition to arm bands, the 1949 Conventions permit chaplains to carry special identification cards.⁸⁴ All members of the armed forces are already permitted to carry a general identification card to prove their entitlement to prisoner-of-war status.⁸⁵ The United States has implemented this provision with the "Geneva Conventions Identification Card."⁸⁶ Chaplains and medical personnel, however, may also carry special identity cards to indicate their protected status. Like the arm bands, the special identity cards must be water-resistant.⁸⁷ Moreover, these pocket-sized cards must contain the following information:

- (a) the personal information of the cardholder (i.e., surname, first names, date of birth, rank, and servicenumber);
- (b) a statement regarding the special protection of the cardholder (e.g., medical personnel or chaplain);
- (c) a photograph of the cardholder;

⁸⁴ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁸⁵ "Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth." GC III, *supra* note 17, art. 17.

⁸⁶ DEPARTMENT OF DEFENSE, DD FORM 2 (October 1993).

⁸⁷ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

- (d) either the cardholder's signature, his fingerprints, or both; and
- (e) the embossed stamp of the military authority that issued the card.⁸⁸

Similar to the arm bands, these cards must also bear the "distinctive emblem" of the red cross, red crescent, *et cetera*.⁸⁹

As with the general identification card, the possession of these special identity cards is extremely important if such persons are actually captured. The arm band is "not in itself sufficient" to prove the protected status of person.⁹⁰ Instead, such captured persons must be able to show definitively that they are entitled to the truly unique standard of treatment which will be discussed below. Consequently, the possession of such special identity cards is "necessary."⁹¹

While the 1949 Conventions also provide a standard format for these special identity cards, the U.S. military has subsequently implemented and adopted a standard form which complies with that format. Specifically, Department of Defense Form 1934 is entitled the "Geneva Conventions Identity Card For Medical and Religious Personnel Who Serve In or Accompany the Armed Forces."⁹² The reverse side of this identity card specifically states:

THE PERSON WHOSE SIGNATURE,
PHOTOGRAPH AND FINGERPRINTS APPEAR
HEREON IS PROTECTED BY THE GENEVA
CONVENTIONS FOR THE AMELIORATION OF
THE CONDITION OF WOUNDED AND SICK IN
THE ARMED FORCES IN THE FIELD, AND AT
SEA OF AUGUST 12, 1949. IF THE BEARER
SHALL FALL INTO THE HANDS OF AN
ENEMY OF THE UNITED STATES, HE SHALL
AT ONCE SHOW THIS CARD TO THE
DETAINING AUTHORITIES TO ASSIST IN HIS
IDENTIFICATION. WHILE RETAINED HE IS
ENTITLED AS A MINIMUM TO THE BENEFITS
AND PROTECTIONS EXTENDED TO

⁸⁸ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁸⁹ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁹⁰ COMMENTARY TO GC I, *supra* note 43, at 312.

⁹¹ *Id.*

⁹² DEPARTMENT OF DEFENSE, DD FORM 1934 (1 July 1974).

PRISONERS OF WAR OF EQUIVALENT
RANK.⁹³

As a practical tip, commands (and their staff judge advocates, legal officers, or legal clerks) deploying to combat regions should ensure that these special identity cards are issued to accompanying chaplains and medical personnel who are potentially “liable to capture or detention.”⁹⁴ For Navy personnel, such special cards may be issued by the respective command’s Administration Department or at their local Personnel Support Detachment.⁹⁵ While the command has some responsibility for ensuring that such cards are issued to their personnel, deploying chaplains clearly have a personal vested interest in seeking and obtaining such cards prior to deployment. With the limitations exacted upon chaplains in the battlefield by LOAC, deploying chaplains should take advantage of every possible method and means of protecting themselves afforded under LOAC, to include the arm band and special identity card.

E. Status Restrictions Under U.S. Policy

1. Religious Duties Only

As mentioned earlier, the primary method of distinction codified in the Geneva Conventions was not an arm band or a special identity card, but rather the severe restrictions on the permissible battlefield conduct of chaplains. The text and commentaries to the Geneva Conventions⁹⁶ only protect chaplains who are employed “exclusively” in their religious duties. Additionally, those legal sources prohibit chaplains from “any form of participation” whatsoever in the hostilities. Understandably, our armed forces have uniformly established restrictions on the duties U.S. chaplains may perform in the battlespace and on the possession of arms in the performance of those duties.

For Navy chaplains, the policy is clear concerning the limits of their duties in support of any sea service unit. For chaplains assigned to Navy commands, Article 1063 of the U.S. Navy Regulations provides: “While assigned to a combat area during a period of armed conflict, members

⁹³ *Id.*

⁹⁴ DEPARTMENT OF THE NAVY, BUREAU OF NAVAL PERSONNEL INSTRUCTION (BUPERSINST) 1750.10A, IDENTIFICATION CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR FAMILY MEMBERS, AND OTHER ELIGIBLE PERSONNEL (1 March 1998) 17. Note this same instruction has been issued by each of the services, respectively, as DEPARTMENT OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-3026(I); DEPARTMENT OF THE ARMY, ARMY REGULATION 600-8-14; DEPARTMENT OF THE NAVY, MARINE CORPS ORDER P5512.1B; AND COAST GUARD, COMMANDANT INSTRUCTION M5512.1.

⁹⁵ *Id.* at 64.

⁹⁶ See discussion *supra* Section IIC.

of...Chaplain...Corps... shall be detailed or permitted to perform only such duties as are related to...religious service and the administration of...religious units and establishments.”⁹⁷ The single stated purpose of this regulation is “to protect the noncombatant status of these personnel” under the Geneva Convention.⁹⁸ Similarly, for chaplains assigned to any unit within the Department of the Navy (i.e., Navy or Marine Corps units), the Secretary of the Navy has directed that “chaplains shall be detailed or permitted to perform only such duties as are related to religious ministry support.”⁹⁹ For chaplains assigned to Coast Guard units, the Commandant of the Coast Guard has directed “all Navy chaplains, active duty and Reserve, are noncombatants...and...will not be placed in any duty status which would compromise their status as noncombatants.”¹⁰⁰

This strict policy concerning the limited duties of chaplains is also reflected in directives of the non-sea services. For chaplains assigned to Army units, the applicable Army Regulation states: “Chaplains are noncombatants... Commanders will detail or assign chaplains only to duties related to their profession.”¹⁰¹ Similarly, for chaplains assigned to Air Force units, the applicable regulation directs that “Chaplains do not perform duties that are incompatible with their faith group tenets, professional role, or noncombatant status.”¹⁰²

2. Arms Banned

Just as the services have uniformly implemented a policy of religious duties only, the Navy,¹⁰³ Marine Corps,¹⁰⁴ Army,¹⁰⁵ and Air Force¹⁰⁶ have also

⁹⁷ DEPARTMENT OF THE NAVY, U.S. NAVY REGULATIONS (1990) [hereinafter NAVY REGULATIONS], art. 1063 (“While assigned to a combat area during a period of armed conflict, members of Medical, Dental, Chaplain, Medical Service, Nurse or Hospital Corps and Dental Technicians shall be detailed or permitted to perform only such duties as are related to medical, dental, or religious service and the administration of medical, dental, or religious units and establishments. This restriction is necessary to protect the non-combatant status of these personnel under the Geneva Conventions of August 12, 1949.”).

⁹⁸ *Id.*

⁹⁹ DEPARTMENT OF THE NAVY, SECRETARY OF THE NAVY INSTRUCTION 1730.7B, RELIGIOUS MINISTRY SUPPORT WITHIN THE DEPARTMENT OF THE NAVY (12 October 2000) [hereinafter SECNAVINST 1730.7B], ¶ 4(a); Similarly, “the Marine Corps manual on chaplains states that chaplains...shall perform no duties relating to combat except those prescribed for chaplains.” FMFM 3-61, *supra* note 3, ¶ 1004f.

¹⁰⁰ COAST GUARD, COMMANDANT INSTRUCTION (COMDTINST) M1730.4B, RELIGIOUS MINISTRIES WITHIN THE COAST GUARD (30 August 1994) [hereinafter COMDTINST M1730.4B], ¶ 1(B)(1)(e).

¹⁰¹ DEPARTMENT OF THE ARMY, ARMY REGULATION 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY (26 May 2000) [hereinafter AR 165-1], ¶ 4-3.

¹⁰² DEPARTMENT OF THE AIR FORCE, AIR FORCE INSTRUCTION 52-101, CHAPLAIN PLANNING AND ORGANIZING (1 May 2001) [hereinafter AFI 52-101], ¶ 2.

¹⁰³ SECNAVINST 1730.7B, RELIGIOUS MINISTRY SUPPORT WITHIN THE DEPARTMENT OF THE NAVY (12 October 2000, ¶4(a) (“...Chaplains shall not bear arms....”); DEPARTMENT OF THE NAVY, CHIEF OF NAVAL OPERATIONS INSTRUCTION 1730.1C, RELIGIOUS MINISTRIES IN THE NAVY (8 November 1995), [hereinafter OPNAVINST 1730.1C], encl. 1, ¶ 2(f) (“It is Department of Navy policy that chaplains

specifically prescribed that chaplains will not bear arms. While the exact language of these arms bans vary, the tone of the prohibitions is absolute. None of the service regulations provides for any exceptions or exigent circumstances under which chaplains are permitted to bear arms.

In theory, this absolute policy makes sense. As a non-target in the midst of a forest of targets, chaplains truly find themselves in a precarious situation. This situation, however, could be remedied in only one of two ways: (a) prohibit chaplains from providing their religious services in harm's way, or (b) make every effort to distinguish chaplains from the target-rich environment in which they work. Recall the four criteria of a combatant (serves under a command, carries arms openly, wears distinctive insignia, and abides by law of war). Taken together, U.S. armed forces' policies seek to distinguish battlefield chaplains in appearance¹⁰⁷ by the absence of one indicia of combatant status (preventing them from carrying arms openly or otherwise) and the presence of one indicia of noncombatant status (the distinctive red cross arm band). Otherwise, as the Fleet Marine Force Manual notes, "[t]he simple act of bearing a weapon could identify the chaplain as a combatant."¹⁰⁸

A reader of the Geneva Conventions may notice that medical personnel—the other class of protected armed forces—have a limited right to bear arms without legally jeopardizing their noncombatant status. Specifically, medical personnel working in fixed establishments, with mobile medical units, or aboard hospital ships are legally protected against attack.¹⁰⁹ This protection against attack, however, is not forfeited *per se* if such personnel are armed for the purpose of defending themselves and their patients.¹¹⁰ The stated rationale for this limited

shall not bear arms."); COMDTINST M1730.4B, *supra* note 100 ("[Article 1063, U.S. Navy Regulations] establishes that all Navy chaplains...shall not bear arms at any time.")

¹⁰⁴ FMFM 3-61, *supra* note 3, ¶ 1004f ("Marine Corps regulations...make it clear that chaplains are not to bear arms under any circumstances....[T]he Marine Corps manual on chaplains states that chaplains 'shall bear no arms....'").

¹⁰⁵ AR 165-1, *supra* note 101, ¶ 4-3(c) ("Chaplains are noncombatants and will not bear arms.")

¹⁰⁶ AFI 52-101, *supra* note 102, ¶ 2.1.3 ("Noncombatant Status. Chaplains are noncombatants. Chaplains do not bear arms.")

¹⁰⁷ FMFM 3-61, *supra* note 3, ¶ 1004e ("Chaplains must avoid any appearance of being combatants in order to maintain their protected status under the Geneva Conventions.")

¹⁰⁸ *Id.* at ¶ 1004f.

¹⁰⁹ GC I, *supra* note 41, art. 19 ("Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict...."); GC II, *supra* note 42, art. 22 ("Military hospital ships, that is to say, ships built or equipment by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected....").

¹¹⁰ GC I, *supra* note 41, art. 22 ("The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19 [i.e., the protection against attack]: That the personnel of the unit or establishment are armed, and that they use the arms in their own defence [sic.], or in that of the wounded and sick in their charge.") GC II, *supra* note 42, art. 35

right to bear arms is that such medical personnel “cannot be asked to sacrifice themselves without resistance” when their unit is attacked.¹¹¹ With that being said, the Commentaries to Geneva Convention I stress that this right for such medical personnel is truly limited. Particularly, medical personnel “may only resort to arms for purely defensive purposes” when it is “obviously necessary.”¹¹² Moreover, they must “refrain from all aggressive action” and may not “use force to prevent the capture of their unit by the enemy.”¹¹³ Despite this limited provision for arming medical personnel, the Conventions contain no similar exception for religious personnel.

3. Noncombatant State-of-Mind

Lest there be any doubt as to what is expected from chaplains in armed conflict, the Navy chaplain leadership recently addressed the noncombatant status of chaplains and the absolute restrictions it places upon those personnel. A policy letter to all Navy chaplains soon after the September 11th attacks asserted “that we chaplains are, first and foremost, noncombatants.”¹¹⁴ This noncombatant status of chaplains requires that they “do more than simply refrain from carrying or using weapons; it requires a noncombatant state-of-mind.” Consequently, Navy chaplains “must never participate in *any* activity that compromises [their] noncombatant status, or that of other chaplains.” Stated examples in the policy letter of such prohibited conduct by chaplains included: “participating in the planning of military actions,” “carrying or conveying military intelligence,” and “transporting weapons or ammunition from one location to another.” While such policy guidance may arguably raise the bar above the standards established under international law, it definitely serves to protect the noncombatant status of military chaplains by minimizing the risk of misidentification.

4. Potential Consequences of Violations

The absolute nature of the U.S. policy against chaplains bearing arms makes theoretical sense. Such policies serve to protect the status of chaplains on the battlefield. The fact remains, however, that chaplains are still at risk while performing their duties.¹¹⁵ For some, the policy may be viewed as controversial

(“The following conditions shall not be considered as depriving hospital ships or sick-bays of vessels of the protection due to them: (1) The fact that the crews of ships or sick-bays are armed for the maintenance of order, for their own defence [sic.] or that of the sick and wounded.”).

¹¹¹ COMMENTARY TO GC I, *supra* note 43, at 203.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ DEPARTMENT OF THE NAVY, OFFICE OF CHIEF OF NAVAL OPERATIONS, CHIEF OF CHAPLAINS, CHAPLAIN OF THE MARINE CORPS AND DEPUTY CHIEF OF CHAPLAINS FOR TOTAL FORCE, POLICY LETTER 1730 Ser N097/01301 (8 November 2001) [hereinafter COC POLICY LETTER].

¹¹⁵ “They don’t give a damn whom they shoot, do they, Chaplain?” General Leumuel C. Shepherd, USMC, to Chaplain Connie Griffin, who had just been wounded (quote hanging on lobby wall at Naval

and life-threatening. Therefore, in the battlefield, the reality of war may have to be balanced against the potential consequences of non-compliance.

In a criminal sense, real limits may exist as to whether an armed chaplain could be held accountable for bearing arms in certain situations. For a murder charge,¹¹⁶ a strong argument can be made that every individual—chaplain or otherwise—retains an inherent right to individual self-defense at all times, regardless of whether they are serving in the midst of armed conflict¹¹⁷ or simply going about their daily lives.¹¹⁸ Moreover, a battlefield killing or wounding may potentially be insulated by the related defense of justification,¹¹⁹ as “killing an enemy combatant in battle is justified.”¹²⁰ A chaplain, however, may not necessarily have such justification in light of the modern policies restricting their ability to engage in the fight. For an order’s violation charge, an armed chaplain could probably not be prosecuted for violation of a general order,¹²¹ for none of the service policies concerning chaplains bearing arms contain the requisite language necessary to make such a charge viable.¹²² That said, however, one who violates these service directives and the earlier-mentioned policy letter may arguably be guilty of dereliction of duty.¹²³ A court-martial conviction for dereliction of duty

Chaplains School, Newport, Rhode Island); FMFM 3-61, *supra* note 3, ¶ 1004(e) (“Chaplains are not lawful objects of attack by an enemy, even though they accept the *normal* risks of the combat environment. They become casualties by accident, not by design.”).

¹¹⁶ UNIFORM CODE OF MILITARY JUSTICE, art. 118, 10 USC § 918.

¹¹⁷ CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 January 2000) (unclassified portion) [hereinafter CJCSINST 3121.01A], encl. A, ¶ 5(e) (“Individual Self-Defense. The inherent right to use all necessary means available and to take all appropriate actions to defend oneself and US forces in one’s vicinity from a hostile act or demonstrated hostile intent is a unit of self-defense. Commanders have an obligation to ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense.”).

¹¹⁸ MANUAL FOR COURTS-MARTIAL (2002 ED.) [hereinafter MCM], Part II, Rule for Courts-Martial 916, ¶ e. (“Self-Defense. (1) Homicide or assault cases involving deadly force. It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused: (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and (B) Believed that the force the accused was necessary for protection against death or grievous bodily harm.”)

¹¹⁹ *Id.*, R.C.M. 916, at ¶ c (“Justification. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.”)

¹²⁰ *Id.* R.C.M. 916, at Discussion. Note that the Discussion to each of the Rules for Courts-Martial does not constitute the “official view” or rules of the U.S. Government, and they do not create any rights or responsibilities binding on the U.S. Government. *Id.*, at Preamble to the Rules for Courts-Martial, Discussion.

¹²¹ UNIFORM CODE OF MILITARY JUSTICE, art. 92, 10 U.S.C. § 892.

¹²² MCM, *supra* note 118, Part IV (Punitive Articles), ¶ 16.c.(1).(e) (“*Enforceability*. Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for conducting military functions may not be enforceable under Article 92(1).”).

¹²³ UNIFORM CODE OF MILITARY JUSTICE, art. 92, 10 U.S.C. § 892. See MCM, PART IV, ¶ 16.c.(3)(a) (“Duty. A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service....”) and ¶ 16.c.(3)(c) (“Derelict. A person is derelict in the

carries a maximum punishment of a dismissal, forfeiture of all pay and allowances, and confinement for six months.¹²⁴

In the international realm, the ramifications of chaplains bearing and using arms depend upon how the chaplain holds himself out to others at the time. If the chaplain does not attempt to cloak himself in the permissible methods of distinction (e.g., the arm band), he would merely fall within the category of lawful combatant with the rest of his unit, thereby allowing him to legally participate in combat (under international law only). Consequently, a fighting chaplain would lose his protected status and become a lawful target.¹²⁵

On the other hand, a chaplain who deceptively portrays himself as a noncombatant but acts as a combatant may be guilty of the war crime of perfidy. Perfidy is defined as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.”¹²⁶ Specifically, international law prohibits the “improper use of the distinctive emblem” of the red cross or any other protective emblem.¹²⁷ A violation of that prohibition constitutes a “grave breach” of the Geneva Conventions and the Protocol.¹²⁸ Ultimately, such grave breaches may be prosecuted as war crimes.¹²⁹

performance of duties when that person willfully or negligently fails to perform that person’s duties or when that person performs them in a culpably inefficient manner.”).

¹²⁴ See MCM, PART IV, *supra* note 122, ¶ 16.e.(3).

¹²⁵ FMFM 3-61, *supra* note 3 (“Chaplains must never engage in combat. If they do, they lose their special protected status under the Geneva Conventions and become lawful objects of attack by the enemy.”)

¹²⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (8 June 1977) (hereinafter GP I), art. 37, in DOCUMENTS ON LOW, *SUPRA* note 14, at 422. A reader of GP I should understand that the United States has never ratified the GP I and is, consequently, not legally bound by its provisions as a matter of conventional law. At the same time, however, the United States does accept and follow certain basic provisions of the Protocol (including the ones referenced in this article) as a matter of customary international law. OPERATIONAL LAW HANDBOOK, *supra* note 7, at 11.

¹²⁷ *Id.*, art. 38.

¹²⁸ *Id.*, art. 85 (“[T]he following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: ...the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.”)

¹²⁹ *Id.*, art. 87 (“The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”).

Finally, an armed chaplain on the battlefield risks substantial negative impact for not merely himself, but for all other chaplains for the remainder of that armed conflict and beyond. For example, when Fox News reporter Geraldo Rivera was reporting from Afghanistan, he openly revealed that he was routinely carrying a pistol in the field.¹³⁰ While journalists are not within the same category of protected persons as chaplains and doctors, they are generally noncombatants under LOAC and cannot be lawfully targeted.¹³¹ Consequently, many war correspondents expressed grave concern for the impact that Rivera's actions might have upon them.¹³² As a former NBC correspondent in Vietnam, Arthur Lord complained, "He's endangering every other journalist who's in the area, and that really outrages me."¹³³ Similarly, one chaplain who selfishly elects to use arms, as a practical matter, jeopardizes the protected status of all other chaplains on the battlefield. Consequently, one service's warfighting publication for chaplains specifically points out that "[a]n individual chaplain who violates this policy endangers the noncombatant status of other chaplains."¹³⁴

5. Role of Chaplain Assistant

Does the U.S. military really expect its battlefield chaplains to "turn the other cheek"¹³⁵ to the oncoming fire of an enemy? Not necessarily. The primary method of protection for a combat chaplain is the chaplain's assistant. One of the key responsibilities for the enlisted assistant to a combat chaplain is to provide for the safety and security of that chaplain. In fact, service directives of the Marine Corps,¹³⁶ Army,¹³⁷ and Air Force¹³⁸ specifically recognize the combatant status of

¹³⁰ Howard Rosenberg, *Television: Oh! What a Lively War*, Los Angeles Times (14 December 2001), at 1.

¹³¹ GP I, *supra* note 126, art. 79 ("1. Journalists engaged in the dangerous profession missions in areas of armed conflict, shall be considered as civilians within the meaning of Article 50, paragraph 1. 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4A(4) of the Third Convention.")

¹³² Rosenberg, *supra* note 130.

¹³³ *Id.*

¹³⁴ DEPARTMENT OF THE NAVY, HEADQUARTERS MARINE CORPS, MARINE CORPS WARFIGHTING PUBLICATION 6-12, RELIGIOUS MINISTRY SUPPORT IN THE U.S. MARINE CORPS (15 June 2001) [hereinafter MCWP 6-12], at 2-4.

¹³⁵ Matthew 5:39.

¹³⁶ DEPARTMENT OF THE NAVY, HEADQUARTERS MARINE CORPS, COMMAND RELIGIOUS PROGRAMS IN THE MARINE CORPS, MARINE CORPS ORDER 1730.6D (29 September 1997) [hereinafter MCO 1730.6D], ¶ 5b(2)(a) (Religious Program Specialist are assigned to Marine Corps commands "to protect chaplains in combat operations and to support them in planning, administration, and coordination of the [Command Religious Program]."); DEPARTMENT OF THE NAVY, FLEET MARINE FORCE MANUAL 3-6, RELIGIOUS MINISTRIES IN THE FLEET MARINE FORCE (29 August 1989), ¶ 3001e(2) ("RPs, chaplain assistants, and enlisted Marines who support chaplains are not protected persons under the Geneva Convention. If captured, they are entitled to be treated as POWs.") FMFM 3-61, *supra* note 3, ¶ 1006c ("As combatants, the chaplain assistant, under Geneva Convention rules, are treated as prisoners of war

chaplain assistants and delineate their duty to protect the chaplain in combat operations. While the current Navy directives for religious ministries do not specifically address this role, the Navy Regulations implicitly acknowledge by omission the combatant role of a chaplain's assistant. Notice that the customs and traditions codified in Article 1063 of the Navy Regulations omit the category of chaplains' assistants from the group of personnel whose combat duties are restricted in order to preserve their noncombatant status.¹³⁹ That same Navy Regulation, however, specifically includes the full spectrum of medical personnel (medical, dental, medical service, nurse, hospital corps and dental technicians), not just doctors. Thus, in addition to the LOAC differences between chaplains and doctors that have already been noted,¹⁴⁰ another difference is that chaplain assistants are combatants, pure and simple, as long as they hold themselves out as such.

Now, a hypothetical scenario presents itself where a chaplain and chaplain assistant are tested within the parameters of international law and domestic policy. The Religious Ministry Team¹⁴¹ is deployed in a combat zone, and begins to receive sniper fire. The question then arises: What direct or indirect role is the chaplain permitted to take? In essence, what are the limits of the noncombatant status of the chaplain?

Clearly, the chaplain may not take direct action in response to the incoming fire. The earlier-mentioned service directives set forth a *per se* prohibition against chaplains ever bearing arms.¹⁴² Similarly, the commentaries to

(POWs) if captured. They maintain and qualify with weapons in order to provide: (1) Security for himself and the chaplain. (2) Additional defense for friendly units from enemy attack if called upon.”).

¹³⁷ AR 165-1, *supra* note 101, ¶ 4-7(a) (“Chaplain assistants are combatants and must bear arms and participate in firearms training.”) DEPARTMENT OF THE ARMY, ARMY FIELD MANUAL 16-1, CHAPLAINS, ch. 1 (“The chaplain assistant is a soldier trained to assist the chaplain in religious support and is essential to the religious support mission. Under the direction of the chaplain, the chaplain assistant coordinates Ministry Team operations. To accomplish the mission, the chaplain assistant accompanies the chaplain in the area of operations. As a combatant, the chaplain assistant carries a weapon and provides security for the team on the battlefield.”).

¹³⁸ AFI 52-101, *supra* note 102, ¶ 2.1.3 (“Combatant Status: Chaplain Assistants are combatants.”)

¹³⁹ NAVY REGULATIONS, *supra* note 97, art. 1063 (“While assigned to a combat area during a period of armed conflict, members of Medical, Dental, Chaplain, Medical Service, Nurse or Hospital Corps and Dental Technicians shall be detailed or permitted to perform only such duties as are related to medical, dental, or religious service and the administration of medical, dental, or religious units and establishments. This restriction is necessary to protect the non-combatant status of these personnel under the Geneva Conventions of August 12, 1949.”)

¹⁴⁰ See discussion *supra* Section IIE2.

¹⁴¹ MCWP 6-12, *supra* note 134, at 1-4 (“The religious ministry team (RMT) consists of the chaplain(s), RPs, and other designated command members (e.g., CAs, civilian staff, and appointed lay leaders). The RMT is the commander’s primary asset for comprehensive RMS [Religious Ministry Support] for the unit(s) assigned. Every unit is supported by an RMT. When a unit does not have a chaplain, RMS is provided by an RMT assigned by higher headquarters.”).

¹⁴² See *supra* discussion Section IIE2.

the Geneva Convention make it clear that chaplains “must obviously abstain from all hostile acts.”¹⁴³ Therefore, absent the unresolved right of self-defense in such situations, a chaplain may not take up a weapon and return fire.

The chaplain who takes indirect action against the threat, however, is the more difficult question. First, the chaplain may not even possess the authority to order the chaplain assistant to fire at a particular individual or individuals. Chaplains are staff corps officers who lack significant aspects of authority held by their line officer counterparts. For example, by federal statutes, military chaplains are either unable¹⁴⁴ or limited¹⁴⁵ in their ability to hold positions of military command. Moreover, while Article 1021¹⁴⁶ of the Navy Regulations authorizes all officers to issue orders to subordinates, such authority to do so is limited to “all the necessary authority for the performance of their duties.” In this same chapter of the regulations concerning authority, the now-familiar Article 1063 states that chaplains “assigned to a combat area during a period of armed conflict” are “permitted to perform only such duties as are related to...religious service and the administration of...religious units and establishments.”¹⁴⁷ Thus, the duties of warfighting do not fit within the purview of the chaplain’s authority to issue orders as an officer. In fact, chaplain assistants are specifically trained to be in control of such threatening situations, and to issue rather than receive such direction.¹⁴⁸

¹⁴³ COMMENTARY TO GC I, *supra* note 43, at 220.

¹⁴⁴ 10 U.S.C. § 3581 (“A[n Army] chaplain has rank without command.”); 10 U.S.C. § 8581 (“An officer designated as a[n Air Force] chaplain has rank without command.”)

¹⁴⁵ 10 U.S.C. § 5945 (“Staff Corps Officers: Limitation on Power to Command. An officer in a [Navy] staff corps may command only such activities as are appropriate to his corps.”).

¹⁴⁶ NAVY REGULATIONS, *SUPRA* note 97, art. 1021 (“Authority Over Subordinates. All officers of the naval service, of whatever designation or corps, shall have all the necessary authority for the performance of their duties and shall be obeyed by all persons, of whatever designation or corps, who are, in accordance with these regulations and orders from competent authority, subordinate to them.”).

¹⁴⁷ *Id.*, art. 1061.

¹⁴⁸ Prior to deploying with Marine Corps units in combat regions, U.S. Navy chaplains and Religious Program Specialists must complete Chaplain and Religious Program Specialist Expeditionary Skills Training (CREST) that RP receives prior to deployment in combat regions. An article in the Navy-sponsored *All Hands Magazine* revealed the following:

“Unlike other fields in the armed forces, the Chaplains Corps is unique. While in the field, the RP must be in control when it comes to safety. The chaplains are non-combatants and don’t carry a weapon, so it’s essential for them to trust and follow their RP’s direction.

‘If the Chaplain doesn’t listen to what I say while in combat, we’ll both be in a lot of trouble,’ said Religious Program Specialist Seaman Susan Pitterman. To some officers it may be difficult taking orders from an enlisted, especially when those orders are coming from junior Sailors who have been in the Navy for less than a year.

‘If I remember I’m a pastor first, it won’t bother me to take orders,’ said Chaplain (LTJG) Wesly Modder. ‘The emphasis should be that the RP is not a secretary, they’re my bodyguard, my teammate.’” *Prayer and Protection*, ALL HANDS MAGAZINE, March 2001, available at www.mediacen.navy.mil/pubs/allhands/mar01/pg32.htm.

Second, even if the chaplain were to possess the inherent authority to issue such orders, the mere issuing of the order may transform that individual chaplain into a lawful target. The Commentary to the 1949 Conventions state “to enjoy immunity, they must naturally abstain from any form of participation—even indirect—in hostile acts.”¹⁴⁹ As a general rule, to use the language of Geneva Protocol I, individual chaplains “shall not be the object of attack.”¹⁵⁰ Such protection, however, exists only “unless and for such time as they take a direct part in the hostilities.”¹⁵¹ At that point, an order by the chaplain to “take that sniper” would be no different than an order issued by any line officer or non-commissioned officer to “take that hill.” Consequently, such a “direct part” would arguably render the chaplain to be a lawful target.¹⁵²

Therefore, the best piece of legal advice for combat chaplains is to make sure their assigned RP or chaplain assistant is a good shot.¹⁵³

III. Legal Treatment of Chaplains in Armed Conflict

The special status of chaplains dictates that they receive special treatment in comparison to other members of the armed forces. Such treatment is special at all times, whether they are working on the battlefield or captured by the enemy’s forces. In the battlespace, chaplains shall be “respected and protected.”¹⁵⁴ Upon capture, such chaplains may be “retained” in a prisoner of war camp. Below we will see what exactly these phrases mean under international law. In the end, it will be evident that the treatment of chaplains is truly unique, in that they are entitled to a mixture of rights and responsibilities of the various categories of personnel, as well as a few benefits unique to themselves.

A. Treatment In the Battlespace

As mentioned earlier, chaplains in the battlespace shall be “respected and protected in all circumstances,” regardless of whether they are located on land¹⁵⁵ or

¹⁴⁹ COMMENTARY TO GC I, *supra* note 43, at 221.

¹⁵⁰ GP I, *supra* note 126, art. 51, ¶ 2.

¹⁵¹ *Id.*, art. 51, ¶s 2 and 3.

¹⁵² *Id.*

¹⁵³ FMFM 3-6, *supra* note 136, ¶ 3001e(2) (“Chaplains must ensure that [RPs, chaplain assistants, and enlisted Marines who support chaplains], as combatants, maintain their qualification with their T/O weapons.”).

¹⁵⁴ GC I, *supra* note 41, art. 24; GC II, *supra* note 42, art. 37.

¹⁵⁵ GC I, *supra* note 41, art. 24. (“Medical personnel exclusively engaged in the search for, or the collection, transport, or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.”)

at sea.¹⁵⁶ What exactly does it mean to be respected and protected? As explained in the Commentaries to the 1949 Conventions, respect is defined to mean “to spare, not to attack.”¹⁵⁷ Protect is defined as “to come to someone’s defence [sic], to lend help and support.”¹⁵⁸ Therefore, the use of these specific terms “made it unlawful” for an enemy’s forces to “attack, kill, illtreat or in any way harm” such personnel, while simultaneously imposing upon the enemy “an obligation to come to his aid and give him such care as his condition required.”¹⁵⁹

Additionally, the remainder of the phrase “in all circumstances” carries significant import in the 1949 Conventions. It was intended to signify that such persons are to be protected “just as much when they are with their own army or in no man’s land as when they have fallen into the hands of the enemy.”¹⁶⁰ For medical and religious personnel, the Commentary recognized that they must be respected and protected “at all times and in all places, both on the battlefield and behind the lines, and whether retained only temporarily by the enemy or for a lengthy period.”¹⁶¹

As with many of the provisions, Protocol I uses language which is easier to understand than the vague respect-and-protect standard of the original Conventions that had forced readers to rely upon definitions buried in the Commentaries. Specifically, Protocol I directs that chaplains (fitting within the defined category of civilians) “shall not be the object of attack” unless they “take a direct part in hostilities.”¹⁶² Attack is defined under the Protocol as “acts of violence against the adversary, whether in offence [sic] or in defence [sic].”¹⁶³ While this language of Protocol I does not alter the treatment standard set by the Conventions, its clarity assists in comprehending the standard.

B. Treatment Upon Capture

As mentioned above, chaplains must be respected whether they are located on the battlefield or detained by the enemy’s forces. If captured by the enemy, most members of the armed forces become prisoners of war (POW).¹⁶⁴

¹⁵⁶ GC II, *supra* note 42, art. 37 (“The religious, medical and hospital personnel assigned to the medical and spiritual care of [members of a nation’s armed forces who are wounded, sick, and shipwrecked at sea] shall, if they fall into the hands of enemy, be respected and protected....”).

¹⁵⁷ COMMENTARY TO GC I, *supra* note 43, at 134.

¹⁵⁸ COMMENTARY TO GC I, *supra* note 43, at 135.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 220.

¹⁶² GP I, *supra* note 126, art. 51, ¶s (2) and (3).

¹⁶³ *Id.*, art. 39(1).

¹⁶⁴ GC III, *supra* note 17, art. 4 (“Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1)

POW status mandates a laundry list of treatment benefits delineated in the Third Convention of 1949. Consequently, it is significant and desirable to obtain this benefit-loaded legal status upon capture, as demonstrated in the recent news stories and legal discussions concerning the Al Qaeda and Taliban personnel detained by U.S. forces in Guantanamo Bay, Cuba.¹⁶⁵ These same 1949 Conventions, however, specifically state that chaplains and medical personnel shall not be “deemed”¹⁶⁶ or “considered”¹⁶⁷ prisoners of war. (Because chaplain assistants are lawful combatants, however, they would be entitled to POW status). While this lack of POW status for chaplains might appear at first glance to result in a lesser status, the Conventions substitute POW status for chaplains with a more enhanced standard of treatment which actually gives them similar protections to POWs with additional privileges. Historically, it is worth noting that the question of retention of medical personnel and chaplains was “the most important” issue resolved by the First Convention of 1949.¹⁶⁸ Ultimately, the four Conventions recognized the special status for captured chaplains and medical personnel as “retained persons,” the details of which will be discussed below.

1. Duration of Retention

Upon capture, prisoners of war may generally be held by the enemy until the end of the war.¹⁶⁹ Captured chaplains and medical personnel, however, are held under a different standard under the 1949 Conventions. Specifically, chaplains who are “attached to the armed forces” and who “fall into” the enemy’s hands may be “retained” by the enemy.¹⁷⁰ The parties to the Conventions agreed that it was “necessary to affirm the supra-national and quasi-neutral character of personnel whose duties placed them outside the conflict.”¹⁷¹ Customarily, such quasi-neutral personnel should be repatriated if captured. Retention should be “an exceptional measure” with only one purpose in view—helping the detained personnel.¹⁷² Likewise, the stated length of such retention of chaplains is not for a

Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces....”).

¹⁶⁵ George Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L. L. 891 (October 2002).

¹⁶⁶ GC I, *supra* note 41, art. 28 (“Personnel designated in Article 24 and 26 who fall into the hands of the adverse Party...shall not be deemed prisoners of war.”)

¹⁶⁷ GC III, *supra* note 17, art. 33. (“Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war.”)

¹⁶⁸ COMMENTARY TO GC I, *supra* note 43, at 235.

¹⁶⁹ GC III, *supra* note 17, art. 118. (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”)

¹⁷⁰ GC I, *supra* note 41, art. 28.

¹⁷¹ JEAN S. PICTET, COMMENTARY TO GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (International Committee of the Red Cross 1952) (hereinafter COMMENTARY TO GC III) at 218.

¹⁷² *Id.*

set period of time or for the duration of the armed conflict like POWs. Instead, the term of their retention is conditionally based upon the “necessity”¹⁷³ or “need”¹⁷⁴ for their religious services. Therefore, if their retention is “not indispensable,” then the Conventions mandate that chaplains be returned to their side of the conflict as soon as practicable.¹⁷⁵

2. Entitlement to POW Benefits

While retained chaplains do not receive prisoner of war status, they are entitled to prisoner of war treatment. Specifically, the Conventions state that such retained chaplains are entitled “as a minimum” to all of the “benefits” and “protections” afforded to prisoners of war under the Third Convention.¹⁷⁶ The phrase “as a minimum” indicates that “treatment as prisoners of war should be regarded as a minimum standard” and that retained chaplains “should have a privileged position.”¹⁷⁷ Thus, the Conventions invite belligerents to give retained chaplains “additional advantages over and above those expressly provided for in the Conventions, whenever it is possible to do so.”¹⁷⁸

For the sake of economy, POW benefits will not be discussed in depth here. Generally, the provisions of the Conventions secure a wide range of POW benefits, including: humane treatment, rapid evacuation from the battlefield, possession of personal property, hygienic and healthful conditions, adequate maintenance (quarters, food, clothing, amenities, and medical care), equality of treatment, limited questioning by captors, right to send and receive correspondence, and religious liberties.¹⁷⁹ If necessary, readers should be prepared to consult the provisions of the Third Geneva Conventions and the corresponding commentaries that generally afford benefits to POWs.

3. Subject to Internal Camp Discipline

¹⁷³ GC III, *supra* note 17, art. 37 (“[T]hey may continue to carry out their duties as long as this is necessary for the care of the wounded and sick....If, however, it prove necessary to retain some of this personnel owing to the medical or spiritual needs of prisoners of war, everything possible shall be done for their earliest possible landing.”)

¹⁷⁴ GC I, *supra* note 41, art. 28 (“Personnel designated in Article 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, spiritual needs and the number of prisoners of war require.”).

¹⁷⁵ GC I, *supra* note 41, art. 30 (“Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit.”).

¹⁷⁶ GC I, *supra* note 41, art. 28 (“Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.”); GC III, *supra* note 17, art. 33. (“They shall, however, receive as a minimum the benefits and protection of the present Convention.”)

¹⁷⁷ COMMENTARY TO GC III, *supra* note 171, at 218.

¹⁷⁸ *Id.*

¹⁷⁹ See GC III, *supra* note 17, arts. 12-38.

Under Article 33 of the Third Convention, retained chaplains shall be subject to the “internal discipline” of the camp.¹⁸⁰ In any military organization, the subordinate personnel are “subject to military discipline.”¹⁸¹ Obviously, this need for good order and discipline is especially necessary in a camp full of enemy prisoners of war. Moreover, complications would surely arise in a military community where enemy personnel live and work in a camp but evade the “discipline common to all.”¹⁸² As such, these retained chaplains will come under the authority of the camp commander, except when they are actually carrying out their religious duties.¹⁸³

4. Performance of Duties

As a general rule, most prisoners of war can be compelled to work on behalf of the enemy.¹⁸⁴ This compelled work is limited to certain types of tasks.¹⁸⁵ More importantly, only enlisted personnel can be required to work in the POW camp.¹⁸⁶ Under no circumstances can commissioned officers be required to work.¹⁸⁷ Ironically, chaplains and medical personnel are the only detained officers who continue to work in a prisoner of war camp. Chaplains shall continue to perform their “spiritual duties” on behalf of the prisoners of war.¹⁸⁸ Apparently, such work by these officers can be mandated, as religious duties shall be “under the orders” of the enemy captors.¹⁸⁹ Such mandated work, however, is limited to their spiritual duties, as they cannot be required to perform any other work duties.¹⁹⁰

¹⁸⁰ GC III, *supra* note 17, art. 33.

¹⁸¹ COMMENTARY TO GC III, *supra* note 171, at 223.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ GC III, *supra* note 17, art. 49. (“The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health.”).

¹⁸⁵ GC III, *supra* note 17, art. 50.

¹⁸⁶ GC III, *supra* note 17, art. 49.

¹⁸⁷ GC III, *supra* note 17, art. 49 (“If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.”).

¹⁸⁸ GC I, *supra* note 41, art. 28 (“Within the framework of the military laws and regulations of the Detaining Power, and under the authority of its competent service, they shall continue to carry out, in accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong.”).

¹⁸⁹ GC I, *supra* note 41, art. 30 (“They shall continue to fulfill their duties under the orders of the adverse Party....”).

¹⁹⁰ “GC I, *supra* note 41, art. 28(c) (“Although retained personnel in a camp shall be subject to its internal discipline, they shall not, however be required to perform any work outside their medical or religious duties.”); GC III, *supra* note 17, art. 33 (“Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties.”).

Additionally, the enemy captors can regulate the performance of those religious duties,¹⁹¹ but to a limited extent. More specifically, the Conventions set limits upon how much captors can meddle in the doctrinal aspects of religious duties. For example, the First Convention states that retained chaplains can only be used to serve “in accordance with their professional ethics.”¹⁹² Similarly, the Third Convention dictates that they must serve only “in accordance with their professional etiquette.”¹⁹³ Thereafter, the same convention states that retained chaplains may minister “freely” to POWs “of the same religion” and “in accordance with [the chaplain’s] religious conscience.”¹⁹⁴ Therefore, the enemy captors could presumably dictate neither the content nor the methods of worship provided by the retained chaplain.

5. Understanding the Religious Benefits of POWs

In order to effectively perform these spiritual duties, a retained chaplain must first know the parameters of the POW benefits that specifically pertain to their religious faith. The Geneva Conventions recognize the importance of the “morale welfare” of prisoners of war, to include their physical and spiritual needs.¹⁹⁵ With regards to spiritual needs, the Conventions’ drafters cited a frequent “phenomenon” among persons of all religious faiths.¹⁹⁶ Namely, individuals who had abandoned their faith practices as adults actually “reverted to their childhood practices” when they became prisoners of war and “found comfort” in such pursuits.¹⁹⁷

The drafters further recognized the inherent value of prisoners who were in a peaceful state of mind. While the Conventions provide a litany of benefits to POWs, the reality of such confinement still “exposes” them to an “hardship.”¹⁹⁸ Recalling one of the overarching principles of LOAC (i.e., humanity), the commentators noted the “humanitarian spirit” of the religious benefits secured by the Conventions.¹⁹⁹ Religion can have “beneficial results” on the individual POW’s “psychological state.”²⁰⁰ Collectively, this improved psychological state within the POW population can benefit the detaining power, as it frequently “eases” their task of confinement.²⁰¹

¹⁹¹ GC I, *supra* note 41, art. 28 (“...within the scope of the military laws and regulations of the Detaining Power and under the control of its competent services.”).

¹⁹² GC I, *supra* note 41, art. 28.

¹⁹³ GC III, *supra* note 17, art. 33.

¹⁹⁴ GC III, *supra* note 17, art. 35.

¹⁹⁵ COMMENTARY TO GC III, *supra* note 171, at 225.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

Based upon these interests, the Third Convention sets forth some basic guarantees for POWs that protect their religious rights. In general, prisoners of war “shall enjoy complete latitude in the exercise of their religious duties,” including the right to attend services of their respective faiths.²⁰² The phrase “complete latitude” was intended to secure religious liberty for all “religious creeds” without “any adverse distinction.”²⁰³

Such religious liberty is conditioned, however, upon whether the POWs comply with the “disciplinary routine” of the enemy captors.²⁰⁴ This phrase was not necessarily intended to condition a POW’s right to exercise religious liberties upon whether they committed misconduct in the camp. Instead, the phrase implies that the exercise of POW religious liberties should be permitted as part of the “normal system of administration, general time-table and other activities” and “without special authorization.”²⁰⁵ Therefore, the Conventions mandate that the camp authorities find a “balance” between the prisoners’ obligation to comply with the disciplinary routine and the camp’s obligation to afford complete latitude in their religious liberties.²⁰⁶

Regarding a location for worship, the Third Convention further secures the right to “adequate premises” for religious services.²⁰⁷ The term “premises” does not mandate that the facility should be used “solely for religious services.”²⁰⁸ Such facilities, however, must be “adequate” in that they must be clean and “constructed as to provide adequate accommodation for those who attend the services.”²⁰⁹ Therefore, general-use facilities are sufficient “if necessary modifications can be made.”²¹⁰ For example, a hut, a tent or a room in a building may be “quite suitable.”²¹¹

Regarding the materials needed for worship, the Third Convention envisions some assistance from sources outside the prison camp. Historically, the camp authorities in World War II often provided the required articles for the prisoners’ worship, with some assistance from international relief organizations.²¹² Consequently, a separate provision in the Third Convention allows POWs to

²⁰² GC III, *supra* note 17, art. 34.

²⁰³ COMMENTARY TO GC III, *supra* note 171, at 227.

²⁰⁴ GC III, *supra* note 17, art. 34.

²⁰⁵ COMMENTARY TO GC III, *supra* note 171, at 228.

²⁰⁶ *Id.* at 227.

²⁰⁷ GC III, *supra* note 17, art. 34.

²⁰⁸ COMMENTARY TO GC III, *supra* note 171, at 228.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

receive “individual parcels or collective shipments” of a non-belligerent nature.²¹³ Such permissible categories of items include foodstuffs, clothing, medical supplies and “articles of a religious character which may meet their needs.”²¹⁴ Such articles include, but are not limited to, religious books and devotional articles.²¹⁵

Regarding a time of worship, another provision in the Third Convention secures one day per week which could serve as the Sabbath day for the prisoners. Specifically, the working POWs are “allowed” a full day of “rest” every week.²¹⁶ This day of rest is “preferably” on Sunday or “the day of rest in their country of origin.”²¹⁷ Therefore, the Commentaries recognized that the selection of that weekly date “is often determined by religious rules.”²¹⁸

6. Special Facilities

Historically, other conventions prior to 1949 had addressed religious benefits for POWs. The Hague Convention of 1907 secured the basic religious liberties for POWs.²¹⁹ Additionally, the Geneva Conventions of 1929 authorized retained chaplains to minister “freely” to the POWs.²²⁰ The 1929 Conventions, however, failed to address the logistical collaboration between those retained chaplains and the camp authorities needed to fully support the POWs’ religious benefits. Recognizing this weakness in the previous conventions, the drafters of the 1949 Conventions included additional language which “enlarged in scope” the ways chaplains may promote those benefits.²²¹

Clearly, the 1949 Conventions expect much from the retained chaplains. With all of the expectations for chaplains and the performance of their duties in the camp, the Conventions fortunately do not create a series of “unfunded” mandates, for the lack of a better term. Instead, the Conventions secure special privileges to chaplains so that they can meet those expectations.

Under the 1949 Conventions, retained chaplains are guaranteed several “facilities” for the purpose of “carrying out their...spiritual duties.” In this

²¹³ GC III, *supra* note 17, art. 72.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ GC III, *supra* note 17, art. 53.

²¹⁷ *Id.*

²¹⁸ COMMENTARY TO GC III, *supra* note 171, at 228.

²¹⁹ HR IV, *supra* note 16, art. 18 (“Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.”)

²²⁰ Convention Relative to the Treatment of Prisoners of War (27 July 1929), art. 16, *in* Documents on LOAC, *supra* note 36 (“Ministers of religion, who are prisoners of war, whatever may be their denomination, shall be allowed freely to minister to their co-religionists.”).

²²¹ COMMENTARY TO GC III, *supra* note 171, at 227.

context, the term “facilities” does not necessarily constitute only the common use of that term (e.g., a building), but rather also consists of certain special privileges²²² that facilitate the performance of their spiritual duties. Some facilities may be derived from other convention provisions that address explicit privileges generally geared towards other personnel (e.g., library, reading room, and newspaper privileges).²²³ Other facilities may also be implied from the nature of their religious services (e.g., separate quarters to meet privately with POWs).²²⁴ Most importantly, the Conventions include four significant facilities which are specifically provided to help chaplains perform their duties: the allocation facility, the visitation facility, the access facility, and the correspondence facility.

a. Allocation Facility

To better ensure that more POWs have an opportunity to satisfy their spiritual needs, the Conventions provide that any retained chaplains will be distributed effectively throughout the detention camps. Specifically, the camp authorities must “allocate” the retained chaplains “among the various camps and labour detachments.”²²⁵ In order to ensure such ministries reach the intended audiences, the Convention further specifies that allocations should be geared towards POWs who possess a common characteristic as that retained chaplain. Such common characteristics include that they “belong to the same forces,” they “speak the same language,” or they “practice the same religion.”²²⁶ In another provision, the Conventions specifically set a preference of services, in that the retained chaplains shall perform their duties “preferably” for their own nation’s prisoners.²²⁷

b. Visitation Facility

Retained chaplains are authorized to “visit periodically” prisoners of war who are “situated in working detachments or in hospitals outside the camp.”²²⁸

²²² One of the dictionary definitions of facility includes: “Something that permits the easier performance of an action.” THE RANDOM HOUSE DICTIONARY 311 (1980).

²²³ COMMENTARY TO GC III, *supra* note 171, at 232 (“The ‘necessary’ facilities include, in the first place, those listed in Article 33, but that list is by no means exhaustive. Reference should also be made to Section VI, Chapter II (Article 79 and 81) and to the commentary on Article 81, which concerns the prerogatives of prisoners’ representatives; libraries, reading rooms or the circulation of a newspaper may prove most useful to chaplains.”).

²²⁴ COMMENTARY TO GC III, *supra* note 171, at 232 (“Lastly, it should be noted that the Detaining Power must grant such personal facilities to chaplains as are necessary if they are to carry out their duties. For instance, they should if possible be given separate quarters so that they may converse freely and frankly with prisoners.”).

²²⁵ GC III, *supra* note 17, art. 35.

²²⁶ GC III, *supra* note 17, art. 35.

²²⁷ GC I, *supra* note 41, art. 28; GC III, *supra* note 17, art. 33.

²²⁸ GC III, *supra* note 17, art. 33.

The rationale for this facility is the POWs need medical and spiritual assistance “no matter where they are.”²²⁹ Consequently, their ministers “must be able to leave camp and make whatever journeys are required.”²³⁰

Obviously, a necessary component of the visitation facility is transportation. If the retained chaplain has no access to transportation, then the visitation facility is rendered meaningless. Consequently, the Convention places an affirmative obligation upon the detaining forces. The camp commander is responsible for placing “the necessary means of transport” at the disposal of the retained chaplain.²³¹

At the same time, this visitation facility has its limits. First, the camp authorities may “exercise such supervision as it considers necessary over these journeys.”²³² As part of this ability to supervise, the camp authorities may designate an escort to accompany the visiting chaplain on such trips. Second, these visiting chaplains must not “misuse” this visitation facility. Instead, they must use this unique privilege of leaving the detention camp only for purpose of visiting prisoners “in need of their services.”²³³ In reality, any retained chaplain must also realize and understand that their liberty will inevitably be restricted “to some extent,” even though they are “not in captivity” from a strictly legal point of view.²³⁴

c. Access Facility

Typically, prisoners of war who desire to express any complaints or concerns to their captors must do so through their elected prisoner representatives.²³⁵ Retained persons, however, are not obligated to follow that method of communication. Instead, the Geneva Conventions provide that retained chaplains “shall have the right to deal with” camp authorities regarding “all questions relating to their duties.”²³⁶ While both retained medical personnel and retained chaplains enjoy this same facility, the chaplains’ facility is more significant because every chaplain has the privilege, whereas only the senior medical officer has it.²³⁷ The chaplain’s access facility is individualized because

²²⁹ COMMENTARY TO GC I, *supra* note 43, at 248; COMMENTARY TO GC III, *supra* note 171, at 221.

²³⁰ COMMENTARY TO GC I, *supra* note 43, at 248; COMMENTARY TO GC III, *supra* note 171, at 221.

²³¹ GC III, Article 33. “They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting prisoners of war outside their camp.” GC III, *supra* note 17, art. 35.

²³² COMMENTARY TO GC I, *supra* note 43, at 248; COMMENTARY TO GC III, *supra* note 171, at 221.

²³³ COMMENTARY TO GC I, *supra* note 43, at 248; COMMENTARY TO GC III, *supra* note 171, at 221.

²³⁴ COMMENTARY TO GC III, *supra* note 171, at 218.

²³⁵ GC III, *supra* note 17, art. 78.

²³⁶ GC III, *supra* note 17, art. 33.

²³⁷ GC III, *supra* note 17, art. 33 (“The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical

chaplains “do not form a separate corps, are few in number, and are often of different denominations.”²³⁸

With the access facility, the chaplain may be called upon to serve as a conduit for the POWs concerning their religious freedoms. Presumably, camp authorities may try to argue that the chaplain is solely or primarily responsible for ensuring that the POWs are able to exercise their religious freedoms and have adequate facilities for doing so. In any negotiation with camp authorities, retained chaplains must understand and point out that their mere presence and service does not absolve the camp authorities from providing religious accommodations and other Convention benefits to the prisoners.²³⁹

d. Correspondence Facility

The fourth facility for performing their spiritual duties is the correspondence facility. In general, all prisoners of war are entitled to send and receive letters and cards.²⁴⁰ This correspondence benefit for POWs, however, can be limited by the camp authorities in several significant ways. One such permissible restriction involves the monthly volume of correspondence. Generally, the camp authorities may limit the monthly amounts to two letters and four cards per POW.²⁴¹ Special circumstances may occur, however, that permit the camp authorities to further restrict the volume of correspondence, especially if there are problems in finding adequate translators.²⁴²

In addition to the POW benefit of correspondence, retained chaplains enjoy a work-related privilege of correspondence.²⁴³ To prevent an arbitrary obstacle to zealous performance of duties, this correspondence facility includes an “exemption from restriction as to quantity.”²⁴⁴ Moreover, if censorship efforts by the detaining power results in a backlog, the correspondence facility for retained chaplains includes the “right of priority for censorship.”²⁴⁵ Therefore, the retained

personnel....This senior medical officer, as well as chaplains, shall have the right to deal with the competent authorities of the camp on all questions related to their duties.”).

²³⁸ COMMENTARY TO GC I, *supra* note 43, at 251; COMMENTARY TO GC III, *supra* note 171, at 222.

²³⁹ GC I, *supra* note 41, art. 28 (“None of the preceding provisions [in Article 28] shall relieve the Detaining Power of the obligations imposed upon it with regard to the medical and spiritual welfare of the prisoners of war.”).

²⁴⁰ GC III, *supra* note 17, art. 71 (“Prisoners of war shall be allowed to send and receive letters and cards.”).

²⁴¹ GC III, *supra* note 17, art. 71.

²⁴² GC III, *supra* note 17, art. 71.

²⁴³ GC III, *supra* note 17, art. 35 (“Letters and cards which they may send for this purpose shall be in addition to the quota provided for in Article 71.”).

²⁴⁴ COMMENTARY TO GC III, *supra* note 171, at 232.

²⁴⁵ *Id.*

chaplains' cards and letters will be reviewed first, minimizing the delay in the effective performance of their duties.

At the same time, however, the chaplains' additional correspondence facility does have limits and restrictions. First, such correspondence must address "matters concerning their religious duties."²⁴⁶ Second, correspondence must be exchanged with either "the ecclesiastical authorities" in that nation or "international religious organizations."²⁴⁷ Third, as mentioned above, letter-writing is "subject to censorship" by the camp authorities.²⁴⁸ The purpose of such censorship is presumably to ensure the noncombatant purpose of all letters.

7. Code of Conduct Under U.S. Policy

As a matter of international law, the Geneva Conventions establish a general matrix of protections and obligations effective in prisoner of war camps. This matrix assigns expectations for the camp authorities, but also includes expectations for detained prisoners. This matrix of expectations applies to the personnel of all warring nations. In addition, the United States Government has developed other obligations for American servicemembers who are detained by the enemy. These policy principles are commonly known as the Code of Conduct. Arising primarily in response to problems experienced by American POWs during the Korean War, the Code of Conduct was intended to help future American POWs "serve honorably while resisting their captor's efforts to exploit them to the advantage of the enemies' cause and the disadvantage of their own."²⁴⁹ While the Geneva Conventions focus primarily upon the standards of how an enemy should treat the detained personnel in their hands, the Code of Conduct focuses on how American personnel should behave while being so detained.

²⁴⁶ GC III, *supra* note 17, art. 35.

²⁴⁷ GC III, *supra* note 17, art. 35.

²⁴⁸ GC III, *supra* note 17, art. 35.

²⁴⁹ DEPARTMENT OF DEFENSE INSTRUCTION 1300.21, CODE OF CONDUCT TRAINING AND EDUCATION (28 January 2001) [hereinafter DODINST 1300.21].

The Code consists of six tightly constructed articles.²⁵⁰ These six articles specifically apply to all members of the U.S. armed forces.²⁵¹ Further instructional DOD guidance, however, recognizes the special nature of medical and religious personnel. As a result, the implementing policy guidance provides a modicum of “flexibility” and “special allowances” for medical personnel and chaplains in five out of the six articles of the Code.²⁵² These policy differences for chaplains should be considered, and will be examined below.

Under Article I of the Code of Conduct, members of the U.S. armed forces are generally expected to be loyal to the American way of life and its cause. Specifically, they have a duty “to support U.S. interests and oppose U.S. enemies regardless of the circumstances, whether located in a combat environment or in captivity.”²⁵³ With the special status of “retained person,” chaplains who fall into the hands of the enemy are permitted a level of “latitude and flexibility” to perform their professional duties. This latitude, however, does not completely relieve these retained chaplains of their general obligation to abide by the Code.

Under Article II of the Code, members of the U.S. armed forces may never surrender voluntarily, but must continually attempt to evade capture. A member may view himself or herself as captured against his or her will only

²⁵⁰ The six articles of the Code of Conduct are as follows:

Article 1. I am an American fighting in the forces that guard my country and our way of life. I am prepared to give my life in their defense.

Article 2. I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

Article 3. If I am captured, I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

Article 4. If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

Article 5. When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

Article 6. I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

DEPARTMENT OF DEFENSE DIRECTIVE 1300.7, TRAINING AND EDUCATION TO SUPPORT THE CODE OF CONDUCT (23 December 1988); Exec. Order 10,631 (17 August 1955), amended by Exec. Order 12,633, 53 Fed. Reg. 10355 (28 March 1988).

²⁵¹ DODINST 1300.21, *supra* note 249.

²⁵² The Instruction provides no special allowances for medical personnel and chaplains regarding Article VI. *Id.*, ¶ E2.3.6.

²⁵³ *Id.*, ¶ E2.2.1.1.1.

“when there is no chance for meaningful resistance, evasion is impossible, and further fighting would lead to their death with no significant loss to the enemy.”²⁵⁴ With such conditions, the general standard for capture-against-will requires “utmost necessity and extremity”²⁵⁵ for most U.S. forces. Chaplains, on the other hand, are limited in their use of force under the Geneva Conventions. Specifically, they must refrain from “all aggressive action” and may not “use force to prevent their capture or that of their unit by the enemy.”²⁵⁶ Consequently, chaplains in such situations are “subject to lawful capture.”

Under Article III of the Code, members of the Armed Forces must continue to resist, make every effort to escape, and aid others to escape. The DOD interpretation of this provision of the Code recognizes the special nature of the chaplain’s “retained” status. In order to take advantage of this status, chaplains are obligated—both initially and continually—to assert their rights as retained personnel to perform their religious duties.²⁵⁷ Beyond that assertion, however, the applicability of Article III to chaplains depends upon the detaining power’s response to such assertions. If the detaining power recognizes the special status, treats the chaplain as a retained person, and permits the chaplain to perform his religious duties within the POW community, then that individual chaplain does not have an Article III duty to escape or to actively aid others in escaping.²⁵⁸ On the other hand, if the detaining power does not permit the chaplain to perform his religious duties within the POW community, then that chaplain maintains the general duties and obligations of escape and aiding others to escape.²⁵⁹ Regardless of the posture of the detaining power in this respect, chaplains are never permitted to do anything “detrimental to the POWs or the interests of the United States.”²⁶⁰

Under Article IV of the Code, American POWs are obligated to organize in a military command structure. Specifically, the senior military POW “eligible for command” in the POW community must assume command of that community, and may not evade that responsibility.²⁶¹ Military chaplains, however, are generally ineligible for command and shall not assume command over military personnel in a POW camp.²⁶² Once the senior military POW assumes command of the community, all POWs within that community shall be informed of the chain of command.²⁶³ As part of that notification, the military regulations regarding the

²⁵⁴ *Id.*, ¶ E2.2.2.1.1.

²⁵⁵ *Id.*

²⁵⁶ *Id.*, ¶ E2.3.2.

²⁵⁷ *Id.*, ¶ E2.3.3.1

²⁵⁸ *Id.*, ¶ E2.3.3.3

²⁵⁹ *Id.*, ¶ E2.3.3.4

²⁶⁰ *Id.*

²⁶¹ *Id.*, ¶ E2.2.4.1.4

²⁶² *Id.*, ¶ E2.3.4

²⁶³ *Id.*, ¶ E2.2.4.1.5.

command ineligibility of chaplains should be explained to all personnel (if applicable), in order to avoid any later confusion.²⁶⁴ Thereafter, all subordinates within the POW community must obey all lawful orders issued by ranking American military personnel.²⁶⁵

Under Article V of the Code, military personnel within a POW community must provide only limited information when questioned by the detaining power. Specifically, the Code mandates that such personnel provide the proverbial name, rank, date of birth, and serial number. These limited disclosures are mandated under the Geneva Conventions.²⁶⁶ While international law does not require disclosure beyond those four basic facts, the DOD instructive guidance recognizes that “it is unrealistic to expect a POW to remain confined for years reciting only name, rank, service number, and date of birth.”²⁶⁷ Consequently, the guidance generally permits “certain types of conversations” with the detaining power within the camp. With regard to the type of conversations, chaplains may need to communicate with the detaining power “in connection with their professional responsibilities,”²⁶⁸ presumably to raise issues about providing religious services within the POW community.

IV. Domestic Role of U.S. Chaplains in Armed Conflict

There is substantial discussion about the chaplain’s role as a retained person in the Geneva Conventions. Historically, chaplains of U.S. armed forces faced a strong potential to be captured and become retained persons. In modern warfare, however, the more common role of our chaplains may be the domestic role of advising the detainer and ministering to detainees. As the U.S. Navy chaplain serving at Camp X-ray described his unique duties, “[t]he primary purpose is to advise the commanding general of issues pertinent to the spiritual and religious needs of the detainees. The second purpose is to minister to the detainees directly.”²⁶⁹ This dual-hatted role can be complex, and requires knowledge of the law from a slightly different perspective than from a purely international perspective.²⁷⁰

²⁶⁴ *Id.*, ¶ E2.3.4.

²⁶⁵ *Id.*, ¶ E2.2.4.1.5.

²⁶⁶ GC III, *supra* note 17, art. 17 (“Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names, and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”).

²⁶⁷ DODINST 1300.21, *supra* note 251, ¶ E2.2.5.1.

²⁶⁸ *Id.*, ¶ E2.3.5.

²⁶⁹ Miguel Enesco, *U.S. Muslim Military Chaplain Leads Guantanamo Prisoners in Prayer*, AGENCE FRANCE PRESSE, 25 January 2002.

²⁷⁰ See discussion *supra* Sections IIIB.

A. Understanding the Status and Treatment Standards for Enemy Detainees

In fulfilling the obligations for the advisor-minister roles, the detaining forces (including the chaplain) must first know the legal status of the detained persons. As should be clear from earlier discussions in the article, the status of a specific person dictates the appropriate standard of treatment when detained. This legal status depends primarily upon the organizational affiliation and the belligerent conduct of the detained persons. More specifically, the appropriate standard of treatment depends upon whether the detained persons are entitled to prisoner-of-war status. If the persons satisfy the prerequisites for prisoner-of-war status, then they are entitled a detailed litany of protections under the Third Geneva Convention.²⁷¹ If the persons fail to satisfy those prerequisites, they are not legally entitled to the conventional protections. At the same time, however, they may be entitled to less stringent protections set forth elsewhere in the conventions or under U.S. policy.

To be entitled to prisoner-of-war status, persons must be involved in a certain nature of armed conflict (i.e., international conflict) and they must fulfill certain conditions (i.e., combatant criteria). First, the Third Geneva Convention only applies to international armed conflict²⁷² – that is, an armed conflict between two nations which are signatories to the convention. Second, the bulk of the protections of the Third Geneva Convention are reserved for individuals who meet the four conditions of lawful combatant status.²⁷³ Only by satisfying both of these prerequisites will a person be legally entitled to prisoner of war status and its corresponding protections.

In practical terms of modern geopolitics, what might this mean for U.S. armed forces in the near future? The United States is a signatory to the Third Geneva Convention, and is generally obligated to follow its terms in the “right type” of conflict and for the “right type” of persons. Under the nature-of-conflict condition, a conflict with any of the three nations most likely to become a declared enemy of the United States in the near future would result in the “right type” of an international armed conflict. More specifically, President Bush’s recognized “axis of evil”²⁷⁴ of Iraq,²⁷⁵ Iran,²⁷⁶ and North Korea²⁷⁷ are all “contracting parties” that

²⁷¹ See discussion *supra* Sections IIB2.

²⁷² GC III, *supra* note 17, art. 2 (“[T]he Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”).

²⁷³ See discussion *supra* Section IIC.

²⁷⁴ President’s State of the Union Address to Congress, 29 January 2002, available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

²⁷⁵ Iraq ratified GC III on 14 February 1956. CHART: GENEVA CONVENTIONS OF 12 AUGUST 1949 AND ADDITIONAL PROTOCOLS OF 8 JUNE 1977: RATIFICATIONS, ACCESSIONS, AND SUCCESSIONS, available

ratified the Third Geneva Convention. Thus, members of these nations' armed forces would generally be entitled to prisoner-of-war status if detained in an armed conflict with the United States, assuming that such individuals satisfied the four criteria for a lawful combatant.²⁷⁸

At the same time, however, the global war against terrorism fails to satisfy the legal standard of an international armed conflict in the conventional sense. Members of the Al Qaeda terrorist organization are not affiliated with a contracting state party to the Third Geneva Convention. Therefore, the United States Government has already determined and announced that these terrorists are not entitled to prisoner-of-war status.²⁷⁹ In any event, the national leadership is responsible for making the ultimate decisions of status and will ensure that such decisions are disseminated down the chain of command.

Even if a detained person or persons fail to meet the "right type" of conflict and "right type" of person, the "detaining power" of the U.S. armed forces must still follow certain standards of treatment beyond those required for prisoners of war. For example, "Common"²⁸⁰ Article Three of the Geneva Conventions sets forth minimal standards of treatment for persons who are detained in the midst of a non-international conflict and take "no active part in the hostilities." Generally,

at www.icrc.org. When this article went to press, the United States had recently commenced Operation Iraqi Freedom. Within five days of commencing hostilities, both sides to the conflict had captured enemy troops. The United States declared that captured Iraqi troops would be afforded prisoner-of-war status under international law and expected the Iraqi military to reciprocate. See ASSISTANT SECRETARY OF DEFENSE VICTORIA CLARKE AND MAJOR GENERAL STANLEY A. MCCHRISTAL, DEPARTMENT OF DEFENSE NEWS BRIEFING (24 March 2003), available at http://www.defenselink.mil/news/Mar2003/t03242003_t0324asd.html ("Let me talk for just a minute about the Iraqi treatment of the coalition prisoners of war. As we said yesterday, it is a blatant violation of the Geneva Convention to humiliate and abuse prisoners of war or to harm them in any way. As President Bush said yesterday, those who harm POWs will be found and punished as war criminals. The Iraqi regime must allow the International Red Cross to see the prisoners. In contrast, this abuse of the coalition prisoners, to how well we are treating the Iraqi soldiers, who are our prisoners of war. Right now, more than 50 Iraqis, soldiers and civilians alike, are aboard U.S. Naval vessels receiving medical care and treatment. We are treating all of the POWs in accordance with the Geneva Conventions, with dignity and respect, and they will soon have access to the Red Cross.").

²⁷⁶ Iran ratified GC III on 20 February 1957. *Id.*

²⁷⁷ North Korea ratified GC III on 24 August 1957. *Id.*

²⁷⁸ For example, in analyzing the legal status of Taliban detainees from the war in Afghanistan, the U.S. Government conceded that Afghanistan was a signatory to the Geneva Conventions of 1949. However, the Bush Administration further concluded that the Taliban detainees were still not entitled to prisoner of war status because they failed to satisfy four-criterion standard for a lawful combatant. See SECRETARY DONALD RUMSFELD AND GENERAL RICHARD MYERS, DEPARTMENT OF DEFENSE DAILY NEWS BRIEFING (8 February 2002), available at www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html [HEREINAFTER DOD DETAINEE BRIEFING].

²⁷⁹ *Id.*

²⁸⁰ This article is often referred to as "Common Article Three" because all four Geneva Conventions of 1949 use the same language in their respective third articles.

these detained persons must be treated “humanely.”²⁸¹ More specifically, the detaining power must not engage in a list of egregious acts against detainees, such as violence, murder, and torture.²⁸²

In addition to the minimal standard of Common Article Three, the United States has unilaterally raised the bar as a matter of domestic policy. In general, the military leadership has mandated:

The Armed Forces of the United States will comply with the law of war during all armed conflicts; however, such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations.²⁸³

More specifically, in dealing with detainees and prisoners of war, U.S. military leadership has established a detainee program, with the stated objective of “ensur[ing] humane and efficient care and full accountability for all persons captured or detained by the U.S. Military Services throughout the duration of military operations.”²⁸⁴ The detainee program is further implemented by Chief of Naval Operations Instruction (OPNAVINST) 3461.6, which sets forth many of the specific details of how U.S. forces are required to apply the obligations of the Geneva Conventions to enemy prisoners of war and other detainees.²⁸⁵

Recently, the U.S. Government has been presented with a situation in which U.S. forces have captured and detained enemy combatants on the battlefield in Afghanistan. Upon capture, the Bush Administration was forced to analyze the status of those detainees and determine the appropriate standard of treatment. In

²⁸¹ GC III, *supra* note 17, art. 3.

²⁸² GC III, *supra* note 17, art. 3 (“...To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages,
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”).

²⁸³ CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 5810.1A, IMPLEMENTATION OF DOD LAW OF WAR PROGRAM (27 August 1999), ¶ 5; DEPARTMENT OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, (9 December 1998), ¶ 5.3.1.

²⁸⁴ DEPARTMENT OF DEFENSE DIRECTIVE 2310.1, DOD ENEMY POW DETAINEE PROGRAM (18 August 1994) [hereinafter DODDIR 2310.1], ¶ E.1.1.4.

²⁸⁵ DEPARTMENT OF THE NAVY, CHIEF OF NAVAL OPERATIONS INSTRUCTION 3461.6, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 November 1997) [hereinafter OPNAVINST 3461.6]. This regulation was uniformly adopted by the services, as DEPARTMENT OF THE ARMY, ARMY REGULATION 190-8; DEPARTMENT OF THE AIR FORCE, AIR FORCE INSTRUCTION 31-304; AND DEPARTMENT OF THE NAVY, HEADQUARTERS MARINE CORPS, MARINE CORPS ORDER 3461.1, respectively.

performing that analysis, the President was admittedly aware of the precedent that it may have upon future conflicts leading to future detainment situations.²⁸⁶ After announcing the President's decision regarding those specific detainees, Secretary Rumsfeld reaffirmed that all such detainees "will be treated humanely and in a manner that's consistent with the principles of the Geneva Convention."²⁸⁷ As a practical matter, what "humane treatment" meant for those detainees was as follows:

They will continue to receive three appropriate meals a day, medical care, clothing, showers, visits from chaplains, Muslim chaplains as appropriate, and the opportunity to worship freely. We will continue to allow the International Committee for the Red Cross to visit each detainee privately, a right that's normally only accorded to individuals who qualify as prisoners of war under the convention.

As a practical matter, a critical point worth noting is that this formal decision was not announced until February of 2002, several months after the battle had begun in Afghanistan and enemy personnel were detained. Consequently, despite the standard procedural system in place (i.e., national leadership decides status and tactical forces treat based upon that decision), the reality demonstrates that U.S. forces must be prepared to follow some interim standard of treatment until a status decision is actually made by higher authority.

The precedence of the Al Qaeda/Taliban detainee decision and its bottom-line message appears to be that U.S. forces must be allowed to balance international law mandates with national security interests. If our national leadership determines that a person or group of persons satisfies the standard for prisoner-of-war status, then U.S. forces must follow the "letter of the law" under the obligations of the Geneva Conventions and the implementing service regulations. If, however, that same leadership determines that such detained persons do not satisfy the standard for prisoner-of-war status, then U.S. forces must follow a modified standard of treatment consistent with the "spirit of the law." Following the principles and spirit of LOAC in handling detainees would include upholding the overarching principle of "humane treatment," while attempting to accommodate the black-letter requirements of the conventions. In essence, such accommodations would incorporate as many conventional requirements as are reasonably possible, and to the extent reasonably possible.

²⁸⁶ DOD DETAINEE BRIEFING, *supra* note 278 ("The United States, as I have said, strongly supports the Geneva Conventions. Indeed, because of the importance of the safety and security of our forces, and because of our application of the convention in this situation might very well set legal precedence that could affect future conflicts, prudence dictated that the U.S. government take care in determining the status of Taliban and Al Qaeda detainees in this conflict.").

²⁸⁷ *Id.*

Any limitations to such accommodations would be based primarily upon the need to protect the national security interests (i.e., the security of the United States and the safety of U.S. personnel). As a practical matter, what this means for the detention camp commander, his staff judge advocate, and his chaplain, is that all U.S. forces involved must be knowledgeable, but flexible—informed on the law, but creative in striving toward it.

From all informed accounts in the media, the leadership and staff at Camp X-ray have attempted to balance interests in handling the Al Qaeda/Taliban detainees. While the detaining forces have maintained the security of the situation, they have also found ways to guarantee humane treatment of the detainees. Their methods of treatment have included specific accommodations to the detainees' spiritual needs. To be sure, such efforts have not been without bumps in the road. They have, however, been steadily progressing forward, to the benefit of all involved. Most importantly, these efforts have consistently involved the service and assistance of a qualified U.S. Navy chaplain. Consequently, some of the details are worth reviewing and highlighting, as many examples of operational teamwork have succeeded in balancing these interests. Likewise, they may carry significant precedence value in similar situations in the future.

B. Advisor Role

A chaplain for U.S. armed forces may be called upon to serve as a critical advisor to the camp commander and security personnel at U.S. detention facilities. To be sure, the staff judge advocate should know the applicable law and regulations in order to properly advise the camp commander. Such legal minds alone, however, have limits. For example, the staff judge advocate may know that a certain LOAC rule mandates a detaining power to provide religiously-suitable meals for enemy prisoners of war. However, that same judge advocate may have zero knowledge or experience as to what would constitute a suitable meal for a particular religion. Only a chaplain of that faith could provide such information. Thus, the religious advisor and the legal advisor may be two individuals, but they must work effectively as a team to ensure that religious standards are met by the commander.

1. U.S. Standard of Treatment

Because the United States is a signatory to the four Geneva Conventions of 1949, all U.S. forces are obligated to follow them as a matter of federal law.²⁸⁸

²⁸⁸ U.S. Constitution, Article VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...*”)(emphasis added).

As mentioned earlier, each of the U.S. armed services has promulgated a directive²⁸⁹ that implements all of the obligations arising from the 1949 Conventions and other conventions, as well as obligations arising from customary international law. The Navy has adopted this directive as OPNAVINST 3461.6. The introductory section of this instruction indicates that it implements the international law regarding enemy prisoners of war (EPWs), retained persons (RPs), civilian internees (CIs), and other detainees (OD). The primary focus, however, is upon the first three categories, with scant guidance for handling other detainees who are not legally entitled to EPW or RP status. Under OPNAVINST 3461.6, the following provisions of the Geneva Conventions are implemented specifically as follows:

<i>Detention Benefit</i>	<i>Geneva Convention Article</i>	<i>OPNAVINST 3461.6 Implementing Paragraph</i>
POWs' Religious Exercise, General	GC III, Art. 34 ²⁹⁰	Paragraph 1-5(g)(1) ²⁹¹
POWs' Adequate Spaces for Religious Services	GC III, Art. 34 ²⁹²	Paragraph 1-5(g)(1) ²⁹³
Retained Persons, Status	GC I, Art. 28 ²⁹⁴	Paragraph 3-15(b) ²⁹⁵
Retained Persons, Special Identity Card	GC I, Art. 40; GC II, Art. 42 ²⁹⁶	Paragraph 3-15(a) ²⁹⁷ and Paragraph 3-15(e) ²⁹⁸
Retained Persons, Armbands	GC I, Art. 40; GC II, Art. 42 ²⁹⁹	Paragraph 3-15(t) ³⁰⁰

²⁸⁹ DODDIR 2310.1, *supra* note 284, ¶ E.1.1.4.

²⁸⁹ OPNAVINST 3461.6, *supra* note 285.

²⁹⁰ See discussion *supra* Section IIIB2.

²⁹¹ "EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities."

²⁹² See discussion *supra* Section IIIB2.

²⁹³ "Adequate space will be provided where religious services may be held." However, it is worth noting that "EPWSs are allowed freedom to worship but will not attend worship services with U.S. personnel." Paragraph 3, Appendix K, Fleet Marine Force Manual 3-61 (Ministry in Combat) (22 Jun 92).

²⁹⁴ See discussion *supra* Section IIIB1.

²⁹⁵ "Enemy personnel, who will fall within any of the following categories, are eligible to be certified as RP:...(3) Chaplains."

²⁹⁶ See discussion *supra* Section IID2.

²⁹⁷ "Enemy personnel entitled to a retained status should have on their person at the time of capture a special identity card attesting to their status. The minimum data shown on the card will be the name, date of birth, grade, and service number of the bearer. The card will state in what capacity the bearer is entitled to the protection of GPW. The card will also bear the photograph of the owner and either the signature or fingerprints or both. It will be embossed with the stamp of the military authority with which the person was serving at time of capture."

²⁹⁸ "Certification of the retained status of personnel will be effected upon the decision that the special identity card held by each such person is valid and authentic. This certification will be decided, if possible, at the time of processing by the camp commander."

²⁹⁹ See discussion *supra* Section IID1.

Retained Persons, Enjoyment of POW Benefits	GC I, Art. 28; GC II, Art. 33 ³⁰¹	Paragraph 3-15(c) ³⁰²
Retained Chaplains, Subject to Internal Discipline	GC I, Art. 28; GC II, Art. 33 ³⁰³	Paragraph 3-15(j) ³⁰⁴
Retained Chaplains' Duties, Generally	GC III, Art. 35 ³⁰⁵	Paragraph 1-5(g)(2) ³⁰⁶
Retained Chaplains, Allocation Facility	GC III, Art. 35 ³⁰⁷	Paragraph 3-15(k) ³⁰⁸
Retained Chaplains, Correspondence Facility	GC III, Art. 35 ³⁰⁹	Paragraph 3-15(u) ³¹⁰
Retained Chaplains, Visitation Facility	GC I, Art. 38; GC III, Art. 33 and 35 ³¹¹	Paragraph 3-15(u)(2) ³¹²
Retained Chaplains, Access Facility	GC III, Art. 33 ³¹³	Paragraph 3-15(u)(4) ³¹⁴
Prisoners Who Are Ministers of Religion, Generally	GC III, Art. 36 ³¹⁵	Paragraph 1-5(g)(3) ³¹⁶

³⁰⁰ "RP will wear on their left sleeve a water resistant arm band bearing the distinctive emblem (Red Cross, Red Crescent) issued and stamped by the military authority of the power with which they have served. Authorized persons who do not have such armbands in their possession will be provided with Geneva Convention brassards (AR 670-1)."

³⁰¹ See discussion *supra* Section IIIB2.

³⁰² "RP whose status is certified will not be considered as EPW; however, they will receive the benefits and protections of an EPW."

³⁰³ See discussion *supra* Section IIIB3.

³⁰⁴ "RP are subject to the internal discipline of the camp in which they are retained; however, they may not be compelled to do any work except that relating to their medical or religious duties."

³⁰⁵ See discussion *supra* Section IIIB4.

³⁰⁶ "Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplain will be allocated, among various camps and labor detachments containing EPW, RPE, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties."

³⁰⁷ See discussion *supra* Section IIIB6a.

³⁰⁸ "RP, who are members of the enemy's Armed Forces, will be assigned to EPW camps. If available, they will be assigned in the ratio of two physicians, two nurses, one chaplain, and seven enlisted medical personnel per 1,000EPW...As much as possible, these RP will be assigned to camps containing EPW from the same Armed Forces upon which the RP depend."

³⁰⁹ See discussion *supra* Section IIIB6d.

³¹⁰ "RP will enjoy the same correspondence privileges as EPW. Chaplains will be free to correspond, subject to censorship, on matters about their religious duties. Correspondence may be with ecclesiastical authorities both in the country where they are retained and in the country on which they depend, and with international religious organizations."

³¹¹ See discussion *supra* Section IIIB6b.

³¹² "They will be authorized to visit EPW periodically in branch camps and in hospitals outside the EPW camps in order to carry out their medical, spiritual, or welfare duties."

³¹³ See discussion *supra* Section IIIB6b.

³¹⁴ "The senior retained medical officer, as well as chaplains, will have the right to correspond and consult with the camp commander or his or her authorized representatives on all questions about their duties."

Prisoners Who Are Ministers, Proof	GC III, Art. 37	Paragraph 3-15(d) ³¹⁷ and Paragraph 3-15(f) ³¹⁸
Prisoners Without A Minister of Their Religion, Generally	GC III, Art. 37 ³¹⁹	Paragraph 1-5(g)(4) ³²⁰
POWs' Diet	GC III, Article 26 ³²¹	Paragraph 3-4(f) ³²²
POWs' Burial Rites	GC III, Article 120 ³²³	Paragraph 3-10(g) ³²⁴

In light of this detailed guidance, chaplains and staff judge advocates of the U.S. armed forces should become familiar with the applicable provisions in handling enemy prisoners of war and retained persons.

Additionally, a Marine Corps directive provides specific guidance on the U.S. chaplain's role in the detention process. First, U.S. chaplains should "encourage" and "utilize" the enemy retained chaplains or any other EPW

³¹⁵ "Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, to minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power. They shall not be obliged to do any other work."

³¹⁶ "Enemy Prisoners of War, who are ministers of religion, without have officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not obligated to do any additional work."

³¹⁷ "EPW who are certified to be proficient medically or religiously continue to be considered and identified as EPW, as appropriate, but will be administered and treated in the same way prescribed for RP."

³¹⁸ "The Theater Commander, or CINCUSACOM will confirm the certification of the technical proficiency of the persons described in paragraph 3-15d. Qualified Military medical and religious personnel must first confirm the medical or religious proficiency of each EPW."

³¹⁹ See discussion *infra* Section IVC.

³²⁰ "If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the prisoner's denomination, or in a minister's absence, a qualified layman, will be appointed, at the request of the prisoners, to fill this office. This appointment, subject to the approval of the camp commander, will take place with agreement from the religious community of prisoners concerned and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States."

³²¹ "The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners. The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed."

³²² "The daily food rations will be sufficient in quantity, quality, and variety to keep EPW/RP in good health and prevent loss of weight or development of nutritional deficiencies. (1) Account will be taken of the habitual diet of the prisoners."

³²³ "The detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place."

³²⁴ "Burial, record of internment, and cremation. Deceased detainees will be buried honorably in a cemetery established for them, according to AR 638-30. Deceased detainees will be buried, if possible, according to the rites of their religion and customs of their military forces."

ministers to provide religious ministrations for the EPWs and other detained persons.³²⁵ The U.S. commander in charge of the unit at the collection points or holding areas of enemy personnel is responsible for “the coordination of these ministries.”³²⁶ Consequently, the U.S. chaplain should serve as the commander’s advisor in this task.³²⁷

2. Accommodations at Camp X-ray

Not every enemy fits neatly into the categories of the Geneva Conventions. As discussed above, some enemy detainees are not legally entitled to protected status. Instead, they receive another standard of treatment, which may not be as clearly defined as the provisions set forth above. Therefore, just as the war on terrorism has been a unique experience under the law, the role of a U.S. chaplain in a U.S. detention facility was fairly unprecedented before the 9/11 attacks and the war on terrorism.³²⁸ Nevertheless, U.S. military chaplains have played an active role in advising the task force commanders at Camp X-ray. Less than two weeks after the first Al Qaeda/Taliban detainees arrived in Guantanamo Bay, U.S. military commanders rushed Lieutenant Abuhena Saif-ul-Islam, of the U.S. Navy Chaplains Corps, from his duty station at Camp Pendleton to the detention facility.³²⁹ His primary responsibility was to “advise senior commanders on Islamic issues.”³³⁰ On the day after his arrival, he also began fulfilling his secondary role as he awoke the detainees with his *adhan*, or morning call to prayer.³³¹

Thereafter, a series of religious accommodations were implemented to balance the security interests of the detainers with the spiritual needs of the detainees. These accommodations included the following efforts by Chaplain Saif-ul-Islam in advising the camp commander, staff, and guards:

- Recommending the initiation and continuation of five calls to prayer each day, consistent with the Islamic faith.³³² Thereafter,

³²⁵ FMFM 3-61, *supra* note 3, app. K, ¶ 3.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Tony Perry, *Muslim Chaplain Embraces New Job Ministering to War Detainees*, LOS ANGELES TIMES, 3 February 2002 (“Now, Navy Lt. Abuhena Saif-ul-Islam has another assignment with no historic precedent: to provide spiritual guidance and comfort to the captured Taliban and Al Qaeda fighters being held at the U.S. naval base in Guantanamo, Cuba.”).

³²⁹ Sandi Dolbee, *Muslim Chaplain Receives a Warm Welcome in Cuba*, SAN DIEGO UNION-TRIBUNE, 27 January 2002, at A-1.

³³⁰ *Call to Prayer Made for Detainees Held in Cuba*, CABLE NEWS NETWORK, 25 January 2002, available at www.cnn.com/2002/WORLD/americas/01/24/detainees.cuba/index.html.

³³¹ *Id.*

³³² Noah Adams, *Interview with Lieutenant Saif-ul-Islam*, NATIONAL PUBLIC RADIO’S ALL THINGS CONSIDERED, 4 February 2002.

he taped a series of such *adhans* for occasions when he might be unavailable.³³³

- Reviewing the detainees' menus to make sure the food "fit within religious dietary restrictions,"³³⁴ (i.e., Muslims do not eat pork). Additionally, he ensured that lamb was served for *Eid al-Adha*, the Islamic Feast of Sacrifice.³³⁵
- Advising camp authorities that "after Islamic fast periods, it is preferable to serve meals to the detainees after sundown."³³⁶
- Obtaining Muslim prayer caps, finger prayer beads, supplemental prayer books and Korans in various languages spoken by the detainees.³³⁷
- Ordering large-type Korans for detainees who have problems with their vision.³³⁸
- Ensuring that the detainees have adequate water and towels for the purification *wadu* before prayers.³³⁹
- Ensuring that a large green sign reading *qibla* in Arabic was posted visibly on one of the guard towers, showing the detainees the correct direction to pray.³⁴⁰
- Advising the detention authorities to not shave the detainees after they had previously been shorn in Afghanistan.³⁴¹
- Establishing "culturally-sensitive" funeral arrangements and procedures, in the event that one of the detainees died.³⁴²
- Providing training to camp guards and other personnel to sensitize them to the elements and culture of Islam.³⁴³

Clearly, each of these initiatives served as an accommodation that balanced the religious interests of the detainees with the security interest of the

³³³ Sandi Dolbee, *Mission Accomplished; Camp Pendleton's First Muslim Chaplain Wraps Up a Three-Year Tour*, SAN DIEGO UNION-TRIBUNE, 9 August 2002, at E-1.

³³⁴ *Id.*; Katharine Q. Seelye, *A Nation Challenged: The Detainees – As Trust Develops, Guards Still Maintain Full Alert*, NEW YORK TIMES, 4 February 2002, sec. A, at 11.

³³⁵ Lisa Fernandez, *Marine Muslim Chaplain Counsels Detainees at Camp X-Ray*, Houston Chronicle, 30 March 2002, at 6; Stephen Kaufman, *Eid al-Adha Observed at Camp X-Ray: Special Meals Prepared for Detainees*, INTERNATIONAL INFORMATION PROGRAMS, U.S. STATE DEPARTMENT, 26 February 2002, available at www.state.gov.

³³⁶ Fernandez, *supra* note 335.

³³⁷ Dolbee, *supra* note 329; Adams, *supra* note 332; Fernandez, *supra* note 335; Carol Rosenberg, *Navy Officer Balances Religious Responsibilities*, MIAMI HERALD, 31 January 2002.

³³⁸ Seelye, *supra* note 334; Rosenberg, *supra* note 337.

³³⁹ Laura J. Brown, *Muslim Chaplain Sees to Detainees' Needs at Guantanamo*, INTERNATIONAL INFORMATION PROGRAMS, U.S. STATE DEPARTMENT, 14 February 2002, available at www.state.gov.

³⁴⁰ Kaufman, *supra* note 335.

³⁴¹ Seelye, *supra* note 334.

³⁴² Dolbee, *supra* note 333.

³⁴³ Darren Barbee, *Muslim Chaplain Is Puzzled By Detainees at Cuba Camp*, FORT WORTH STAR TELEGRAM, 16 February 2002, at 1.

detainers. Moreover, they serve as a “lessons learned” model of what should be considered in future detention situations involving U.S. forces.

C. Minister Role

As must be evident at this point, international law permits nations to clad their ministers in uniforms and allows them to serve within their military ranks. Consequently, many nations have elected to do so, including the United States. If such a nation were to become the declared enemy of the United States, their uniformed chaplains would enjoy all of the privileges provided in the Geneva Conventions that we would expect our chaplains to enjoy.³⁴⁴ Modern warfare, however, is not always so convenient. Depending upon the situation and nature of the conflict, U.S. forces might detain enemy personnel who may or may not include their own religious leadership. Therefore, the question arises: what happens when detained personnel lack a minister within their ranks? The answer to that question depends initially upon the legal status and corresponding treatment standard for detained personnel.

If the detained persons are legally entitled to prisoner-of-war status, the Geneva Conventions envision a situation in which those POWs lack a uniformed chaplain within their ranks. In such cases, a minister of the appropriate religious denomination must be appointed by the “detaining power” – that is, the nation running the detainment facility. Procedurally, this appointment involves four basic steps. First, the substitute minister should be requested by the concerned prisoners of war.³⁴⁵ Second, the detaining power has approval authority on the appointment. Third, the concerned EPWs should be given the opportunity to agree to the selection. Fourth, the local religious authorities of the same denomination should be given a similar opportunity to approve the appointment.

It is critical to note that the appointed minister does not have complete autonomy in the performance of his or her duties. Rather, the appointed minister must still adhere to the security regulations established by the camp commander.³⁴⁶ In these situations, the U.S. chaplain would continue to have a role in regulating appointed ministers and advising the camp commander on matters relating to them. As such, U.S. chaplains should be familiar with the details of the religious liberty provided to POWs under the international law.³⁴⁷

If detained personnel are not entitled to prisoner of war status, then the U.S. camp commander would not necessarily be required to follow the “letter of

³⁴⁴ See discussion *supra* Section IIIB.

³⁴⁵ GC III, *supra* note 17, art. 37.

³⁴⁶ GC III, *supra* note 17, art. 37.

³⁴⁷ See discussion *supra* Section IIIB5.

the law” in appointing outside ministers. Instead, U.S. forces may apply a modified standard of treatment that adheres to the spirit and principles of LOAC.³⁴⁸ In such situations, U.S. chaplains may also be called upon to assume roles as substitute ministers, in addition to their roles as religious advisors to the camp commander. Such a role assumption has been the case at Camp X-ray. In addition to providing detailed guidance to military commanders regarding issues of the Islamic faith, Lieutenant Saif-ul-Islam performed the standard responsibilities of a *de facto* chaplain for the detainees. Specifically, published reports indicated that he served as their *imam* (spiritual teacher), routinely visiting one on one with the detainees for several hours of each day.³⁴⁹ In addition, he served as their *muwa'zzin*, leading the detainees in their call to prayer five times each day.³⁵⁰

D. Conduit Role

In performing these two distinct roles of advisor and minister, a U.S. chaplain may inevitably perform a third role that straddles between the two conventional roles. Specifically, Chaplain Saif-ul-Islam demonstrated how chaplains must sometimes serve effectively as a conduit between the detainers and the detainees. As he told a reporter, “[t]he main thing was to maintain the balance between the troops and detainees. I was the chaplain for both, who seemed to not like each other very much. The balance between the two was unique and challenging.”³⁵¹

Sometimes that balancing act means persuading the detainers to accommodate the interests of the detainees. From the outset, Chaplain Saif-ul-Islam met with individual detainees not only to provide spiritual counsel to them, but also to “listen to their individual concerns.”³⁵² Thereafter, he brought some of those concerns to the attention of military commanders.³⁵³ While recognizing the security interests involved, he effectively advised the camp commanders of ways “that the U.S. military can safeguard its soldiers while adding a few amenities of everyday Islamic life.”³⁵⁴ For example, soon after the detainees were captured on the battlefield and temporarily held in Kandahar, their heads and beards were

³⁴⁸ See discussion *supra* Section IVA.

³⁴⁹ Dolbee, *supra* note 329; Barbee, *supra* note 343.

³⁵⁰ Barbee, *supra* note 343; Fernandez, *supra* note 335; Kaufman, *supra* note 335.

³⁵¹ Dolbee, *supra* note 333.

³⁵² Perry, *supra* note 328.

³⁵³ Thomas Fields-Meyer, *Keeper of the Peace: Navy Chaplain Abuhena Saifulislam Tends to a Challenging Flock: Taliban Prisoners*, PEOPLE, 22 April 2002, at 128 (“In one incident, a guard took a sheet a prisoner had wrapped around his waist to pray – a common Muslim display of modesty. That led more than 150 of the prisoners to launch a hunger strike, but the chaplain was able to intervene, telling [Task Force Commander] General Lehnert, ‘It’s a small thing. And if there is no security issue, why not?’”)

³⁵⁴ Rosenberg, *supra* note 337.

shaved off for hygiene reasons as part of the delousing procedures.³⁵⁵ Upon arriving at Camp X-ray, however, Chaplain Saif-ul-Islam requested permission on behalf of the detainees to re-grow their beards.³⁵⁶ This request was granted by the camp authorities.³⁵⁷ Additionally, he has forwarded requests on behalf of the detainees for more Korans, skullcaps, and prayer rugs.³⁵⁸

In addition to advising camp commanders of these spiritual accommodations, the chaplain may also need to effectively convey spiritual requirements to the U.S. personnel guarding the detainees. For example, some of the detainees brought it to Chaplain Saif-ul-Islam's attention that the guards had tried to perform their duties during the prayer time, which had consequently disturbed those prayers.³⁵⁹ Thereafter, Chaplain Saif-ul-Islam provided cultural-sensitivity training to the guards that "Islam dictates that worshippers not break concentration during prayers, even it means ignoring an order."³⁶⁰ Consequently, one of the guards responded favorably, "I think if we respect the detainees they will probably be more cooperative with our security measures, making our job much easier."³⁶¹

Other times, wearing this conduit hat means helping detainees understand a policy decision of the detainers. For example, some of the detainees expressed a desire to follow the Islamic tradition of praying in a large group during the Friday call to prayer.³⁶² However, Camp X-ray authorities would not allow the detainees to leave their individual cells and pray as a group, for obvious security reasons. Consequently, the chaplain had the responsibility of explaining this decision to the detainees and counseling them that "under extreme conditions, Islam says it's OK to pray individually in their cells during the Friday juma's prayer."

On another occasion, Chaplain Saif-ul-Islam helped end a hunger strike within the detainee population. In August 2002, approximately 200 of the detainees participated in a hunger strike to protest the conditions of their detention.³⁶³ In response, the Muslim chaplain met with individual detainees and "tried to convince them that Islam, the religion he shared with them, does not condone hurting yourself." After approximately half of those protesters resumed

³⁵⁵ Kaufman, *supra* note 335.

³⁵⁶ Perry, *supra* note 328; Barbee, *supra* note 343.

³⁵⁷ Kaufman, *supra* note 335.

³⁵⁸ Perry, *supra* note 328.

³⁵⁹ Joshua S. Higgins, *Religion 101: MPs Get Education During Duty*, DEFEND AMERICA, DEPARTMENT OF DEFENSE, available at www.defendamerica.mil.

³⁶⁰ Fernandez, *supra* note 335.

³⁶¹ Higgins, *supra* note 359.

³⁶² Fernandez, *supra* note 335.

³⁶³ Dolbee, *supra* note 333.

eating, Lieutenant Saif-ul-Islam then sought outside assistance from the Muslim community. Specifically, he contacted a Muslim scholar and requested the writing of a *fatwa*, an interpretation of Islamic law, that supported his position. Based upon these concerted efforts, all but two of the detainees ended their hunger strike.

E. Potential Conflict of Interest in Performing These Roles

The challenge for one of these multi-hatted U.S. chaplains arises when their duties as a minister conflict with those of staff advisor. Logically, one of the only individuals who interacts directly with the detainees might be the chaplain. Moreover, of the limited number of such first-hand contacts, the chaplain would surely have developed one of the better rapports with the detainees. In fact, one of the Camp X-ray staff who was interviewed about the Muslim chaplain's relationship with the detainees commented, "His interaction with the detainees is markedly different from that of the guards or the interrogators."³⁶⁴ Such close relationships can create the potential for ulterior benefits for the detaining power.

A scenario could be envisioned in which prisoners of war or other detainees could provide good intelligence to the detainer. Likewise, a chaplain serving as a substitute minister may be called upon to serve as a conduit for gathering such intelligence. Historically, for example, a U.S. Army psychologist was utilized for information-gathering by the Commander of the prison which housed the German Nazis awaiting trial before the International Military Tribunal at Nuremberg.³⁶⁵ At the same time, however, it is worth noting that U.S. military policymakers condemned attempts by a U.S. Army chaplain who sought to publish a book based upon his ministering to those same Nazi prisoners.³⁶⁶

³⁶⁴ Seelye, *supra* note 334.

³⁶⁵ JOSEPH PERSICO, *NUREMBERG: INFAMY ON TRIAL* (Penguin Books 1994), at 103-104 ("[U.S. Army psychologist Captain Gustav] Gilbert, who had never been summoned to [U.S. Army Colonel Burton] Andrus's office before without [fellow U.S. Army psychologist Major] Kelley, felt apprehensive. [Prison commander] Colonel Andrus greeted Gilbert with forced bonhomie and asked the captain to have a seat. After chitchat about the suitability of Gilbert's quarters, the colonel rose, closed the door, and resumed his place behind the desk. He appreciated, he said, that Gilbert spoke German so well. You could never know what these birds were up to if you could not understand their lingo. Yes, Gilbert was doing fine interpreting, Andrus went on. But, that was only half the job. What he also needed was 'an observer,' Andrus *said*. He wanted Gilbert to hang around with these fellows in the exercise yard, even when they took their weekly showers. Win their confidence, become a friend. Pick up whatever they *said*. And, if it proved interesting, Gilbert should report back to the prison commandant immediately. Andrus wanted him to be a spy, Gilbert realized.").

³⁶⁶ William J. Hourihan, *U.S. Army Chaplain Ministry to German War Criminals at Nuremberg, 1945-1946*, *THE ARMY CHAPLAINCY* (Winter-Spring 2000) ("The objection was based on the ground that the manuscript revealed intimate confidences which were deserving of the secrecy of the confessional. The War Department discourages anything that would possibly suggest to men that chaplains did not zealously guard intimate knowledge and confidence.")

Regardless, this hypothetical scenario begs the question: which master³⁶⁷ does the chaplain serve—that is, which role of the chaplain trumps? The answer to that question depends upon what is the appropriate controlling authority, whether legal, regulatory, or ethical.

1. Analysis Under Evidentiary Rules

At first glance, most military lawyers would assume that the appropriate guiding standard for the confidentiality of detainee statements is the clergy-penitent privilege recognized under evidentiary rules. Such analysis, however, is not that simple. Under Military Rule of Evidence 503, a person has a privilege “to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman’s assistant, if such communication is made either as a formal act of religion or as a matter of conscience.”³⁶⁸ Moreover, M.R.E. 503 further defines who is a clergyman,³⁶⁹ when communication is “confidential,”³⁷⁰ and who may claim the privilege³⁷¹ (i.e., personally and/or vicariously). To be sure, such definitions and explanations are helpful in understanding the parameters of this evidentiary privilege, so that any judge advocate could effectively argue related issues before a court-martial.

The basic rule of M.R.E. 503 is broadly-worded with respect to the individuals that it protects. Specifically, the rule states that “a person” has the privilege that permits them to protect communications made by that “person.” Thus, the rule is not confined in its scope to only certain persons, like other narrow rules which specifically protect an accused,³⁷² a victim,³⁷³ or a witness.³⁷⁴ Instead, M.R.E. 503 theoretically protects all the various players in the military justice process (accused, victim, or witness), much like the other privileges recognized within Section V of the Military Rules of Evidence.³⁷⁵ Consequently, the broad

³⁶⁷ Matthew 22:21 (“Give to Caesar what is Caesar’s, and to God what is God’s.”); Matthew 6:24 (“No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to one and despise the other.”).

³⁶⁸ MIL. R. EVID. 503(a).

³⁶⁹ MIL. R. EVID. 503(b)(1).

³⁷⁰ MIL. R. EVID. 503(b)(2).

³⁷¹ MIL. R. EVID. 503(c).

³⁷² See, e.g., MIL. R. EVID. 304 (Confessions and Admissions), MIL. R. EVID. 311 (Evidence Obtained from Unlawful Searches and Seizures), MIL. R. EVID. 413 (Evidence of Similar Crimes on Sexual Assault Cases), and MIL. R. EVID. 414 (Evidence of Similar Crimes in Child Molestation Cases).

³⁷³ See, e.g., MIL. R. EVID. 404(a)(2) (Character of Victim) and MIL. R. EVID. 412 (Rape Shield Rule).

³⁷⁴ See, e.g., MIL. R. EVID. 608.

³⁷⁵ The Lawyer-Client privilege generally protects the communications of “a client” and broadly defines client as “a person, public officer, corporation, association, organization, or other entity, either public or private.” MIL. R. EVID. 502(a) and (b)(1). Similarly, the Husband-Wife privilege generally protects “a person.” MIL. R. EVID. 504. Moreover, the Psychotherapist-Patient privilege generally protects the communications of “a patient” and broadly defines patient as “a person” who consults with a

language of the rule alone may appear to apply to confidences that any person (including an enemy detainee) may decide to share with a U.S. military chaplain.

For the hypothetical scenario raised above, however, the critical focus is not on the parameters and scope of this evidentiary rule, but on the general applicability of the rule itself. In other words, in what situations would we actually turn to M.R.E. 503, or the entire set of Military Rules of Evidence for that matter? In the first sentence of the first Military Rule of Evidence, it states: “These rules are applicable in courts-martial, including summary courts-martial, to the extent and with the exceptions stated in Mil. R. Evid. 1101.”³⁷⁶ Turning to that further-referenced rule, it states “The rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings.”³⁷⁷

Language such as “all actions, cases, and proceedings” implies applicability beyond merely the open hearings at a convened court-martial consisting of a judge and court members. Clearly, the Military Rules of Evidence apply at various phases of court-martial proceedings, whether the court members are present³⁷⁸ or absent.³⁷⁹ Moreover, while many of these rules are limited to courts-martial, the privilege rules apply to other military proceedings, including non-judicial punishment procedures³⁸⁰ and Article 32 pretrial investigations.³⁸¹ None of the formal rules of evidence, however, apply to certain types of administrative military proceedings, such as administrative separation boards³⁸² and field naval aviator evaluation boards.³⁸³ From such analysis, any person (including an enemy detainee) could clearly invoke the privilege for statements in the proceedings of any U.S. court-martial. Practically, the remaining issue for the use of such statements, however, is whether the declarant could be or would be prosecuted in a court-martial convened by the U.S. military.

While the prosecution of an enemy detainee in a U.S. court-martial may be technically feasible, it may not necessarily be the primary objective of such detention. As to the feasibility for such case, an enemy detainee—prisoner of war

psychotherapist. MIL. R. EVID. 513. Additionally, other rules outside Section V generally protect “a person” like the rule against degrading questions. *See, e.g.*, MIL. R. EVID. 303.

³⁷⁶ MIL. R. EVID. 101(a).

³⁷⁷ MIL. R. EVID. 1101(b).

³⁷⁸ MIL. R. EVID. 1101(a) (The rules apply “generally to all courts-martial, including summary courts-martial.”).

³⁷⁹ MIL. R. EVID. 1101(a) (The rules apply to “proceedings pursuant to Article 39(a).”)

³⁸⁰ MCM, *supra* note 118, Part V (Nonjudicial Punishment), ¶ 4c(3) (“The Military Rules of Evidence, other than with respect to privileges, do not apply at nonjudicial proceedings.”).

³⁸¹ *Id.*, Part II, R.C.M. 405(i) (“The Military Rules of Evidence – other than Mil. R. EVID. 301, 302, 303, 304 412 and Section V [which includes 503] – shall not apply in pretrial investigations under this rule.”)

³⁸² DEPARTMENT OF THE NAVY, NAVAL MILITARY PERSONNEL MANUAL (22 August 2002) [hereinafter MILPERSMAN], art. 1910-510.

³⁸³ *Id.*, art. 1610-020.

or otherwise—may potentially be prosecuted by court-martial. Article 2 of the Uniform Code of Military Justice states that “prisoners of war in custody of the armed forces” are subject to that Code.³⁸⁴ Additionally, Article 18 of the UCMJ indicates that “General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”³⁸⁵ Under these jurisdictional provisions, an enemy POW or other enemy detainee could be prosecuted by a U.S. court-martial. In such courts-martial, M.R.E. 503 would definitely apply.

At the same time, however, it is uncertain whether U.S. military authorities would ever elect to prosecute a detainee relying upon such statements. For example, with the detainees presently held at Camp X-Ray, their interrogators are admittedly less focused on building a criminal case than with developing actionable intelligence to prevent further terrorist attacks by cohorts who remain at large.³⁸⁶ Therefore, the issue of M.R.E. 503’s applicability may be moot if there is no chance the statements will be used in a U.S. court-martial.

³⁸⁴ UCMJ, art. 2, 10 U.S.C. § 802.

³⁸⁵ *Id.*, art. 18, 10 U.S.C. § 818.

³⁸⁶ SECRETARY DONALD RUMSFELD, DEPARTMENT OF DEFENSE DAILY NEWS BRIEFING (22 October 2002), available at http://www.defenselink.mil/news/Oct2002/t10222002_t1022sd.html (“Well, if you think about the universe of detainees, the ones that have been -- for the most part, they’ve all been interrogated or are being interrogated, the purpose being not law enforcement, but intelligence-gathering. If at a certain moment that process proceeds and someone concludes that they’re very likely not to be of any additional intelligence value, then they’re stuck in a different basket, and they’re then looked at for law enforcement purposes: Is this somebody that our country or some other country would like to prosecute and deal with in a law enforcement as opposed to an intelligence-gathering manner? If the conclusion there is no, that not only are they not interesting from an intelligence-gathering, they’re not interesting from a law enforcement standpoint, the next question is: Are they people who ought to be kept off the street simply because they might be inclined to go back and again engage in activities that would be opposed to the Afghan government or to the United States, or whatever. And if the judgment there is that they’re not people who need to be kept off the street for whatever reason -- health or attitude -- then the goal is to not have them. If you don’t want them for intelligence, and you don’t want them for law enforcement, you don’t need to keep them off the street, then let’s be rid of them. And so that process goes forward.”); UNDERSECRETARY DOUGLAS FEITHS, DEPARTMENT OF DEFENSE NEWS BRIEFING ON MILITARY COMMISSIONS (21 March 2002), available at http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html (“We have had from the beginning a screening process to make sure that we do not take into our custody people that should not be held. Most of the people that we are holding were, I believe, captured not by American forces, in the first instance, but by Afghan forces. And the Afghan forces made available a number of these people to us. They were screened. We had specific criteria that applied to decide whether -- to allow our people to decide whether we wanted to take them into U.S. custody. And it had to do with whether they were higher-level people, whether they posed a particular threat to us, whether we had particular intelligence interests in them. And there were thousands of people who were captured by Afghan forces, and yet we are holding only a fraction of that number. And the people that we’re holding we are interrogating. And we’re continually reviewing the information that we have about these people that we’re getting from interrogations, that we’re getting from other countries that are cooperating with us in the field of intelligence or in the field of law enforcement. And if we find that we’re holding somebody who is not of intelligence interest to us, is not of law enforcement interest to us, is not a threat, in our view, to Americans, to the United States, to our interests, to our, you know, allies or friends as a terrorist, if we

Additionally, a special forum now exists for the prosecution of enemy detainees in which neither the Military Rules of Evidence nor any other codified set of evidentiary rules apply. On 13 November 2001, President Bush signed an executive order which authorized the creation of Military Commissions.³⁸⁷ These Commissions would permit the prosecution of terrorists who were not citizens of the United States. Thereafter, Secretary of Defense Donald Rumsfeld promulgated Military Commission Order Number 1.³⁸⁸ That order set forth the procedures for holding such commissions, including the procedures for conducting the actual trials. With regard to procedures of evidence, the only stated standard of admissibility of evidence before such Commissions is as follows:

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.³⁸⁹

With the sole focus of this evidentiary standard on probative value, there appear to be no legal restrictions placed upon the use of confidential communications made by a detainee to a chaplain or any other protected relationship. Clearly, many statements made in confidence to a chaplain may be probative—that is, tending to prove the guilt of the person. Under the Commission's single rule of evidence, however, such probative evidence would be admitted.

Taken together, this analysis of M.R.E. 503 could probably be summarized as follows. First, statements made by an enemy POW or any enemy detainee to a U.S. chaplain might be inadmissible in a court-martial. Second, statements made by an enemy POW or other enemy detainee to U.S. chaplains

don't have any interest in holding the person, we'll let them go."); ASSISTANT SECRETARY VICTORIA CLARKE, DEPARTMENT OF DEFENSE NEWS BRIEFING (9 April 2002), *available at* http://www.defenselink.mil/news/Apr2002/t04092002_t0409asd.html ("They're still interviewing, interrogating the detainees to get as much intel as possible and to get as much information as possible about their circumstances. They're working through that progress. [DOD General Counsel] Jim Haynes is working with a team of people to come up with the system, if you will, by which you determine who goes in which one. But again, I'd say, if you need to put a priority on something, put the priority on what kind of intel are we getting to prevent future attacks.")

³⁸⁷ Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

³⁸⁸ DEPARTMENT OF DEFENSE, MILITARY COMMISSION ORDER NO. 1, PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (21 March 2002).

³⁸⁹ *Id.*, ¶ 6(D).

would be admissible at military commissions. Third, evidentiary rules, like the privilege rule, are completely irrelevant and inapplicable if the statements will be used solely for purposes other than disciplinary actions against that individual detainee, such as pure intelligence-gathering. In light of the second and third points, we must consider whether any other source of legal authority exists that prohibits the revelation of statements made in confidence.

2. Analysis Under Service Regulations

Each of the U.S. armed services has a community of uniformed chaplains within their ranks.³⁹⁰ In establishing the duties and responsibilities of those uniformed chaplains, the services have promulgated regulations³⁹¹ or instructions³⁹² concerning their respective religious programs. Those directives address a range of issues arising in military religious programs. One such issue is the status and scope of privileged communications between these chaplains and any persons who may choose to confide in them. The provisions of these service directives must be considered in evaluating the violability of the hypothetical communications between a U.S. chaplain and an enemy detainee.

Of the three services' directives, the U.S. Army's regulation has the most explicit discussion of the details of protected communications, as well as the broadest protection for such information. Army Regulation 165-1 defines what communications are protected. Under the section entitled "Religious Responsibilities," the regulation defines privileged communications.³⁹³ Note that this definition is generally void of a classification of persons entitled to enjoy this privilege, but focuses rather upon on the communication itself. Consequently, its language appears to be broad enough to protect not only U.S. servicemembers, but other individuals such as family members. Arguably, the criterion as a protected "declarant" under this regulation could include an enemy detainee. In any event, the regulation directs that chaplains and their assistants "will not divulge privileged communications without the written consent of the person(s) authorized to claim the privilege."³⁹⁴

³⁹⁰ The Marine Corps relies upon Navy chaplains who have been detailed to their units. MCO 1730.6D, *supra* note 136.

³⁹¹ AR 165-1, *supra* note 101.

³⁹² SECNAVINST 1730.7B, *supra* note 99; OPNAVINST 1730.1C, *supra* note 103; AFI 52-101, *supra* note 103.

³⁹³ AR 165-1, *supra* note 101, ¶ 4-4m(1) ("A privileged communication is defined as any communication to a chaplain or chaplain assistant given as a formal act of religion or as a matter of conscience. It is communication that is made in confidence to a chaplain acting as a spiritual advisor or to a chaplain assistant aiding a spiritual advisor. Also, it is not intended to be disclosed to third persons other than those to whom disclosure furthers the purpose of the communication, or to those reasonably necessary for the transmission of the communication.").

³⁹⁴ *Id.*, ¶ 4-4m(2). Note that the use of the term "persons authorized to claim the privilege" is not intended to address who may be a lawful parishioner in the Army religious program, but refers to direct

Additionally, the Army regulation also defines another category of communications, which it refers to as “sensitive information.”³⁹⁵ This second category of information appears to serve as a catchall in protecting any communications which fail to satisfy the definition of privileged communications. In general, a chaplain “normally should not” disclose such sensitive information “unless the declarant expressly permits disclosure.”³⁹⁶ Of note, this “sensitive information” category of protected communications is not addressed by the religious regulations of any of the other armed services.

More importantly, the Army Regulation specifically restricts how operational commanders may utilize the services of their detailed chaplains. Under the section entitled “Professional Status of Chaplains,” the regulation includes the earlier-referenced guidance concerning the Army chaplains’ noncombatant status and their restriction against bearing arms.³⁹⁷ Thereafter, the regulation addresses the limits in which any Army commander may utilize their chaplains. Specifically, commanders “will detail or assign chaplains only to duties related to their profession.”³⁹⁸ This restriction then addresses how chaplains may not serve in any official capacity in the military justice process (i.e., as trial counsel, defense counsel, court-martial member, etc.) and may not perform certain collateral duties within the command (e.g., recreation officer, equal opportunity officer, etc.). More pertinent to the present discussion, the regulation then dictates that commanders will not “require a chaplain to serve in a capacity in which he or she may later be called upon to reveal privileged or sensitive information incident to such service.”³⁹⁹ Such language appears to directly prohibit a bait-and-switch of sorts in which the chaplain is assigned to befriend and counsel an enemy detainee, but is subsequently converted into an information-gathering agent for the commander.

If the Army regulation is the most explicit for the three services, the Navy religious directives are arguably the vaguest. The religious ministries within the Department of the Navy are presently guided by SECNAVINST 1730.7B and

or vicarious nature of who can invoke the privilege (i.e., “The privilege against disclosure belongs to the declarant, to his or her guardian or conservator, or to his or her personal representative if the person is deceased. The privilege may also be claimed on behalf of the person by the chaplain or the chaplain assistant who received the communication.”).

³⁹⁵ *Id.*, ¶ 4-4n(1) (“Sensitive information includes any nonprivileged communications to a chaplain, chaplain assistant, or other chaplain support personnel that involves personally sensitive information that would not be a proper subject for general dissemination. Examples of sensitive information are knowledge of a soldier’s attendance at an Alcoholics Anonymous program, treatment by a psychiatrist, a prior arrest, or hospitalization for mental illness.”).

³⁹⁶ *Id.*, ¶ 4-4n(2).

³⁹⁷ *Id.*, ¶ 4-3(c); see discussion *supra* at Section III E2.

³⁹⁸ AR 165-1, *supra* note 101, ¶ 4-3(e).

³⁹⁹ *Id.*, ¶ 4-3e(3).

OPNAVINST 1730.1C. Both directives are unclear in the two most critical questions arising in the hypothetical scenario: who is entitled to religious services in the Navy program, and what are the limits of the clergy privilege. Both directives indicate that the Navy religious programs are available for “all members of the naval service, eligible family members and other authorized personnel.”⁴⁰⁰ Neither directive, however, specifies who fits within the category “other authorized personnel.” For the sake of analyzing this hypothetical, let us assume that enemy detainees would qualify as “other authorized personnel.” Presumably, the U.S. military leadership would not send a U.S. Navy chaplain to counsel enemy detainees without authorizing such religious services for them. Thus, the remaining question is the nature of the clergy privilege under Navy directives.

These Navy directives are equally vague on the nature of this privilege of communications. While the previous version of SECNAVINST 1730 stated that chaplains must “safeguard the privileged communication of servicemembers,”⁴⁰¹ the present SECNAVINST omits any reference to the privilege. In the current OPNAVINST, Navy commanders and commanding officers are required to “[s]afeguard the privileged communications counselees may claim under reference (g) for communications made to chaplains and RPs.”⁴⁰² “Reference (g)” for this directive is M.R.E. 503, discussed above. Yet the term “counselee” is never defined elsewhere in the directive.

The greatest problem, however, with the Navy’s guidance on this issue is the means by which the directive sets the parameters of the privilege. Specifically, the OPNAVINST defines the privilege purely by incorporation of the Military Rule of Evidence. For example, in a hypothetical unrelated to the detainee situation, this directive would not prevent a U.S. Navy chaplain from revealing otherwise privileged communications made by a servicemember or family member, as long as the confidences were disclosed in a forum other than a military justice proceeding.⁴⁰³ Similarly, these Navy religious directives would not restrict the disclosure of communications made by an enemy detainee to a U.S. Navy chaplain.

While the general directives regarding Navy religious ministries are unclear concerning the nature of the penitent-clergy privilege, the recent policy statement issued by the Navy chaplain leadership would probably restrict any fishing expeditions by Navy chaplains in U.S. detention facilities. Recall that the

⁴⁰⁰ SECNAVINST 1730.7B, *supra* note 99, ¶ 5; OPNAVINST 1730.1C, *supra* note 103, ¶ 5c.

⁴⁰¹ DEPARTMENT OF THE NAVY, SECRETARY OF THE NAVY INSTRUCTION 1730.7A, RELIGIOUS MINISTRIES WITHIN THE DEPARTMENT OF THE NAVY (2 September 1993), *quoted in* United States v. Isham, 48 M.J. 603 (N-M. Ct. Crim. App. 1998).

⁴⁰² OPNAVINST 1730.1C, *supra* note 103, encl. 1, ¶ 2(i).

⁴⁰³ See discussion *supra* Section IVE1a.

leadership reminded the chaplain ranks that they are all noncombatants.⁴⁰⁴ As such, the obligations of their noncombatant status dictates that such chaplains “do more than simply refrain from carrying or using weapons; it requires a noncombatant state-of-mind.” Consequently, Navy chaplains “must never participate in *any* activity that compromises [their] noncombatant status, or that of other chaplains.” One of the stated examples, in the policy letter, of such prohibited conduct by chaplains included “carrying or conveying military intelligence.” Notice that the prohibited conduct is not limited only to a chaplain carrying military intelligence on the battlefield from place to place perfidiously using their protected status as a cover. By definition,⁴⁰⁵ the word “conveying” denotes a chaplain who improperly turns over intelligence information regardless of its source—whether couriered on the battlefield on behalf of U.S. intelligence officers or extracted from an enemy detainee under the guise of religious confessions. Consequently, this policy statement would apparently restrict a U.S. chaplain’s ability to reveal information confided by an enemy detainee.

3. Analysis Under Professional Ethics

In addition to the above evidentiary rules and service regulations, each individual U.S. chaplain must also consider the ethical standards of his or her faith community when serving enemy detainees in a U.S. detention facility. As a matter of law in the situation of retained chaplains, the Geneva Conventions specifically allow such retained chaplains to provide spiritual services “in accordance with their professional ethics.”⁴⁰⁶ While this ethical requirement of the conventions applies only to retained chaplains, a U.S. chaplain in a U.S. detention facility is serving as a substitute minister for retained chaplains. As such, that chaplain must arguably comply with the “principles and spirit” of that requirement, in accordance with the DOD Law of War Policy.⁴⁰⁷ Therefore, U.S. chaplains in such situations must apply the appropriate ethical standards concerning the violability of privileged communications.

While each individual faith community presumably has ethical standards, the faith communities have collectively promulgated a unified ethical standard for all faith groups represented by chaplains in the armed forces. At the National Conference on Ministry to the Armed Forces in December of 1994,

⁴⁰⁴ COC POLICY LETTER, *supra* note 114.

⁴⁰⁵ One of the dictionary definitions of convey includes: “to impart, as information.” THE RANDOM HOUSE DICTIONARY 194 (1980).

⁴⁰⁶ GC I, *supra* note 41, art. 28 (Retained chaplains can only be used to serve “in accordance with their professional ethics.”); GC III, *supra* note 17, art. 33. (Retained chaplains must serve only “in accordance with their professional etiquette.”); GC III, *supra* note 17, art. 35 (Retained chaplains may minister “freely” to POWs “of the same religion” and “in accordance with [the chaplain’s] religious conscience.”).

⁴⁰⁷ See discussion *supra* Section IVA.

representatives of the 245 religious bodies recognized by the military services approved “The Covenant and the Code of Ethics for Chaplains of the Armed Forces.”⁴⁰⁸ Specifically, this Code of Ethics stated, “I will hold in confidence any privileged communication received by me during the conduct of my ministry. I will not disclose confidential communications in private or in public.”⁴⁰⁹ The scope and nature of this privilege may vary from faith to faith, and chaplains of all faiths are presumably schooled in great detail as to the limits of that ethical standard within their respective faiths. One fact that remains certain, however, is that any chaplain must adhere to those standards “during the conduct of” their ministries—whether ministering to U.S. servicemembers, enemy detainees, or anyone else.

4. Actual Analysis at Camp X-Ray

In the news coverage concerning the detainees’ treatment at Camp X-ray, the media discussed the nature of the relationship between Chaplain Saif-ul-Islam and the detainees. Some of these discussions actually addressed the status of any information that the detainees shared with him. In one interview with the chaplain, a reporter indicated simply that “Saifulislam wouldn’t reveal private conversations with detainees,” presumably referring to that reporter.⁴¹⁰ In another article written and posted on the website of the U.S. State Department’s International Information Programs, the writer states, “Saiful-Islam often speaks to the detainees one-on-one, in Arabic, his native Bengali, Hindi, or Urdu, and he assures each his promise of confidentiality.”⁴¹¹ In an interview with National Public Radio, the chaplain also indicated that Camp X-ray authorities have not sought to debrief him or otherwise inquired about the confidences shared by the detainees.⁴¹² In addition, on at least three separate occasions, the media posed hypothetical scenarios to Chaplain Saif-ul-Islam to evaluate how he would handle sensitive information provided by the Al-Qaeda/Taliban detainees.

The first hypothetical scenario posed by the media involved confidences about prior actions committed by the detainee. Specifically, the detainee admits, “Yes, I did it. I’m al-Qaeda, and I helped plan jihad against the West. And I

⁴⁰⁸ Isham, *supra* note 401, at 607, n. 4.

⁴⁰⁹ *Id.* at 607.

⁴¹⁰ Fernandez, *supra* note 335.

⁴¹¹ Brown, *supra* note 339.

⁴¹² Adams, *supra* note 332 (“[NPR REPORTER NOAH] ADAMS: At the end of your time talking with [the detainees], are you debriefed by your superiors? Do the people running Camp X-ray want to know what’s on the mind of the prisoners?

LT. SAIFUL-ISLAM: No, not at all. I have 24-hour access, and nobody asks me anything. There is no question asked. Rather I volunteer sometimes some of the things the detainees may want, but nobody asks me anything.”).

know Osama bin Laden.”⁴¹³ In that given scenario, Chaplain Saif-ul-Islam responded that he would not reveal the confidences, but would encourage the detainee to reveal such matters to the appropriate authorities.

The second scenario involved the potential for an immediate threat against the security of the detention camp. In short, a detainee reveals to him, “I have a weapon.”⁴¹⁴ In that given scenario, Chaplain Saif-ul-Islam responded that he would not reveal such confidences, but he hinted that he would take personal action to remove the weapon from the detainee.

The third scenario—possibly the most telling—involved the detainee’s knowledge of future terrorist attacks. In that given scenario, Chaplain Saif-ul-Islam was apparently inclined to reveal such information to the appropriate authorities. He stated that he “maintains the confidentiality of a cleric when speaking to the men about their private struggles.”⁴¹⁵ In matters which go beyond those private struggles, however, he said, “[A]s a chaplain, we have our ways to make a judgment call...on a case-by-case basis...We also have a responsibility to make sure that things of a destructive nature do not take place.”

In short, even if a U.S. chaplain determines that a legal or ethical obligation must be afforded to their relationship with enemy detainees, practical limits to that privilege may exist regarding certain communications, depending upon the nature of the information provided.

V. Conclusions

A. Summary

The battlefield status of military chaplains in international armed conflict is significantly different than the status of most members of the armed forces. While most servicemembers are combatants, chaplains are noncombatants. As

⁴¹³ *Id.* (“ADAMS: Let me ask you a hypothetical question here. If, in counseling, a prisoner through the wire fence – that person said, ‘Yes, I did it. I’m al-Qaeda, and I helped plan jihad against the West. And I know Osama bin Laden,’ what is your responsibility as a naval officer and a chaplain? Is there a conflict there?”)

Lt. SAIFUL-ISLAM: There is a conflict in confidentiality that I may not be able to go and reveal it to the general. But what I can do is to convince him that he should confess this thing to the proper authority for humanity, because wrong is wrong.”).

⁴¹⁴ Rosenberg, *supra* note 337 (“You’re the first-ever American Muslim cleric to minister to a prison camp full of suspected terrorists and one confides he has a weapon. Do you keep the secret? Or do you breach religious confidentiality? If you’re U.S. Navy Lt. Abuhena Mohammad Saiful-Islam you search for a third way to resolve the clear conflict of interest between the crescent moon pin stuck in your left lapel and the lieutenant’s bars on the right side of your uniform. ‘I will say, ‘Give it to me,’ – and not tell the general who had it,’ he says softly but firmly. ‘I’ll make sure that he doesn’t have it.’”).

⁴¹⁵ Barbee, *supra* note 343.

noncombatants, they are protected against attack by enemy forces. In order to retain such protection, however, they must only perform religious duties and not take part in the hostilities—directly or indirectly. Consequently, U.S. military policy strictly mandates that chaplains must confine themselves to religious duties to minimize any risk of misidentification as a combatant. Other ways to ensure the protection of battlefield chaplains include the two distinction methods of red cross arm bands and special identity cards. Additionally, U.S. military policy directs chaplain assistants to protect chaplains assigned to their Religious Ministry Team and permit such assistants to bear arms in performing those combat duties.

Upon capture by the enemy, the status of chaplains is also unique. While not designated as prisoners of war, captured chaplains are entitled to the benefits generally afforded to such prisoners. Additionally, as retained persons, military chaplains are authorized to perform their spiritual duties in a prisoner-of-war camp and are afforded certain privileges to assist them in the performance of those duties. Under U.S. policy, U.S. chaplains retained by the enemy are simultaneously expected to follow the Code of Conduct to a certain extent.

In modern warfare, U.S. chaplains may also be called upon to serve in a domestic role. This role may include service as an advisor to a camp commander of a U.S. detention facility, as a substitute minister to enemy detainees, and as a conduit between the two interests. As a preliminary matter, such chaplains should understand the actual status of the enemy detainees, as that status determines the appropriate standard of treatment. Thereafter, these chaplains must serve consistent with the legal standards under international law and U.S. policy. Meanwhile, they should be continuously cognizant of potential conflicts of interest and know how to resolve such conflicts, such as whether they may disclose communications shared by the enemy detainees. The resolution of such privilege issues depends upon legal, service, and ethical standards.

Through this comprehensive review of the major legal aspects of chaplains serving in armed conflict, critical issues of concern have been raised. In conclusion, many of these recommendations are worth highlighting for potential resolution in the near future or thereafter. Such resolution would involve the actions of various links in the religious chains of command of our armed forces. As such, they are divided and organized below.

B.Recommendations for Service Leadership

In order to promote the lawful role of chaplains in armed conflict, the leadership of the Navy should take the following actions:

First, the Chief of Naval Operations and other service chiefs should update the directives regarding religious ministries to reflect a tightening of the arms policy for chaplains. Currently, each of the services has a policy that strictly prohibits chaplains from bearing arms.⁴¹⁶ These policy directives, however, lack any explicit mechanism for enforcement. Consequently, the military leadership should first make a policy decision as to how important it is to uphold the strict nature of this arms-ban. Thereafter, if the leadership determines that adherence to the ban is critical, such policy directives should be updated to include the requisite language to make a violation of the policy prosecutable as a violation of a lawful general order or regulation.

Second, the Chief of Naval Operations and other service chiefs should address the appropriate standard of treatment for enemy detainees who fail to satisfy the criteria for prisoner-of-war status or retained person status. While the present detention directive of all U.S. services refers to “other detainees,” their guidance focuses almost completely on prisoners of war and retained persons.⁴¹⁷ Unfortunately, it fails to provide definitive guidance as to how U.S. forces should treat other detainees who are not prisoners of war. Because the belligerents of modern warfare tend to fall into the “other” category, U.S. forces need clearer guidance on how such detainees should be treated, including the appropriate parameters of their religious freedom.

Third, the Bureau of Naval Personnel should revise the Navy Uniform Regulations. Presently, such regulations generally dictate that Navy personnel must wear brassards on their right arm.⁴¹⁸ The Geneva Conventions, however, mandate that military chaplains must wear red cross arm bands on their left arm. Like the Army Regulation, the Navy Uniform Regulations should be realigned to conform to international legal requirements.

C. Recommendations for Chaplain Leadership

Within the leadership of the Navy chaplain community, several other issues must be resolved. First, the Navy chaplain leadership should revise the penitent-clergy privilege in updated service directives. Presently, the Navy directive is flawed in that it defines the privilege by merely incorporating M.R.E. 503.⁴¹⁹ While the privilege may coincidentally mirror the language of M.R.E. 503, the Navy directive should not define the privilege merely by incorporating that rule. Otherwise, too many issues arise as to the limits of that privilege, for the actual applicability of M.R.E. 503 is confined to military justice proceedings. The

⁴¹⁶ See discussion *supra* Section IIE2.

⁴¹⁷ See discussion *supra* Section IVB1.

⁴¹⁸ See discussion *supra* Section IID1.

⁴¹⁹ See discussion *supra* Section IVE2.

Army method of defining the privilege should serve as model for the Navy's revisions.

Second, the chaplain leadership should provide definitive guidance as to whether the penitent-clergy privilege specifically applies to communications between U.S. Navy chaplains and enemy detainees. The Navy directive, coupled with the recent policy letter regarding noncombatant status, could arguably prohibit bait-and-switch conversations with detainees, but the guidance should resolve all ambiguity.⁴²⁰ In contrast, the Army regulation appears to resolve the issue definitively. Additionally, this direct guidance should address whether there are situations when otherwise privileged communications may be disclosed, such as the revelation of terrorist acts planned for the future.

Third, the chaplain leadership should provide better guidance regarding the role of Religious Program Specialists (RPs) and other chaplains' assistance on the battlefield. Presently, the key Navy directives fail to even mention the combatant role of the RPs.⁴²¹ Moreover, such revised guidance should also state whether RPs have positional authority over chaplains when their RMT comes under fire. Apparently, chaplains and RPs are currently receiving tactical training that recognizes this limited shifting of authority. The chaplain leadership should either codify the substance of that training, or ensure that such training is modified to address the proper relationship between the RMT members to the leadership's satisfaction.

D. Recommendations for Individual Chaplains

To effectively perform the religious duties in armed conflict, other actions must be taken beyond revising Navy policies. Primarily, individual chaplains should ensure that certain actions are taken.

First, chaplains should seek out appropriate legal training prior to deployment. Essential training includes learning about the applicable legal references that pertain to performance of spiritual duties as retained chaplains and the Code of Conduct's unique expectations for U.S. chaplains.⁴²² Additionally, they must understand the international and domestic sources of law that control the status and treatment of enemy detainees.⁴²³

⁴²⁰ See discussion *supra* Section IVE2.

⁴²¹ See discussion *supra* Section IIE5.

⁴²² See discussion *supra* Sections IIIB and IIIC.

⁴²³ See discussion *supra* Section IVA and IVB.

Second, chaplains should make sure that they have been issued the appropriate means of distinction permitted under international law, including armbands and special identity cards.⁴²⁴

Third, deploying chaplains should ensure that their assigned RPs have received the appropriate combat-skills training, for that RP is their only legally-permitted method of protection on the battlefield.⁴²⁵

Fourth, deploying chaplains should ensure that they have access to copies of the key references that control the treatment standards for enemy prisoners of war and other enemy detainees. Moreover, they should be prepared mentally to advise their operational commander on how to balance religious needs of enemy detainees with the security interests of U.S. forces.⁴²⁶ Such advice should include suggesting creative accommodations that satisfy both interests.

As stated at the outset of this comprehensive review of chaplains in armed conflict, many individuals work together in the U.S. armed forces to defend our nation. Those individuals have many different roles, yet each is critical in its own way to the overall mission of the organization. In essence, they all work for the synergy of the whole with a significant injection of teamwork. In order for this team as a whole to win the deadly “game” of war, they must also comply with the law of armed conflict principles of necessity, humanity, proportionality, and distinction. Moreover, they must follow the specific rules of the game set forth in international law and domestic policy. To comply with the rules, each member of that team must first know and understand the rules that apply to their assigned position on the field. Hopefully, this article has provided thorough guidance to one such starting member of that team about their rules of interest. Ultimately, adhering to those rules of the game will earn chaplains the moniker MVP -- most valuable peacemaker.

⁴²⁴ See discussion *supra* Section IID.

⁴²⁵ See discussion *supra* Section IIE5.

⁴²⁶ See discussion *supra* Section IVB.

Military Commissions: A Legal, Appropriate and Just Means of Trying Suspected Terrorists?

Melvin Heard, Esq., LT Robert P. Monahan, JAGC, USN, William Ryan, Esq., and E. Page Wilkins, Esq.*

In response to the catastrophic events of September 11, 2001, President George W. Bush issued an executive order authorizing the detention, treatment and trial of certain non-U.S. citizens. The President's Military Order, signed November 13, 2001, seeks to protect the United States and its citizens from future terrorist attacks, to ensure the effective conduct of military operations, and to assist in the global fight against terrorism.¹ The order allows for the detention of certain non-U.S. citizens and trial of such individuals by military commission.²

The President viewed the attacks of September 11, 2001 "on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces."³ Furthermore, he determined that due to the danger faced by the United States and the nature of international terrorism, it is not practicable to apply the principles of law and rules of evidence normally recognized in criminal trials to military commissions.⁴ Therefore, on March 21, 2002, Secretary of Defense Donald Rumsfeld issued the rules of procedure for such commissions.⁵

While a military commission under the President's Military Order has yet to exercise its jurisdiction, the authorization of commissions and the rules to be applied by them have been the subject of much debate—specifically, whether military commissions are a lawful and appropriate means of trying the individuals within their coverage. This article asserts that the President's Military Order

* *The following article was prepared as a work of academic analysis. The views expressed within represent solely the opinions of the individual authors and should NOT be construed to represent the position of the Department of Defense, Department of the Navy, or any other government organization.*

The article's genesis was the course "International Human Rights: Law of War, War Crimes, and Genocide" taught during the 2002 Spring Semester by Professor Allan A. Ryan, Jr. at Boston College Law School. The article was edited by LT Bob Passerello, JAGC, USN, and LT Byron A. Divins Jr., JAGC, USN.

¹ President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 13, 2001) § 1 (d)-(e).

² *Id.* § 3(a).

³ *Id.* § 1(a).

⁴ *Id.* § 1(f).

⁵ Department of Defense, Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, (March 21, 2002).

establishing military commissions is lawful and appropriate for adjudicating those non-U.S. citizens who fall under its jurisdiction. Part I will examine the President's Military Order and its components. Part II will discuss the legal precedent and policy support for the establishment of the commissions and will address the arguments of those opposed to them. Part III will examine the procedural rules governing the conduct of the military commissions issued by the Secretary of Defense and will analyze the strengths and weaknesses of such rules. The Manual for Courts-Martial and the Charter of the International Military Tribunal, and its application at the Nuremberg Trial, will be used as tools for comparison.

I. The President's Military Order

In issuing the President's Military Order, the President based his authority to establish military commissions on both statutory and constitutional grounds. The President specifically cites his constitutional power as Commander in Chief of the Armed Forces (Art. II, cl. 2) and statutes describing his ability to establish military commissions and the rules for such commissions (10 U.S.C. §§ 821 and 826).⁶ The President's Military Order describes the events leading up to its issuance—the terrorist attacks of September 11, 2001 and the declaration of a national state of emergency on September 14, 2001. The order was issued to protect the nation and its citizens from future terrorist attacks, to facilitate military operations against terrorists, and to assist other countries in their fight against terrorism.⁷ The President's Military Order is limited to individuals who are non-U.S. citizens and who are either (1) members of Al-Qaeda, (2) those engaged in terrorist activities or planning terrorist activities designed to cause "injury or adverse effect on the United States, its citizens, national security, foreign policy or economy," or (3) those who have harbored such individuals.⁸ Individuals who meet these criteria shall be detained under humane conditions either within or outside the United States.⁹ Individuals subject to the President's Military Order are to be tried by military commissions in accordance with rules issued by the Secretary of Defense.¹⁰ In addition, other agencies of the United States are required to provide assistance to the Secretary of Defense in order to effectively implement the President's Military Order.¹¹

II. The Legal Foundation for Military Commissions

A. Precedent

⁶ President's Military Order, Preamble.

⁷ *Id.*

⁸ *Id.* § 2(a)(1)(i)-(iii).

⁹ *Id.* § 3(a)-(e).

¹⁰ President's Military Order § 4(a)-(b).

¹¹ *Id.* § 5.

Articles I and II of the U.S. Constitution and the Uniform Code of Military Justice grant military commissions the jurisdiction to try individuals who violate the law of war.¹² Article I, Section 8 of the Constitution empowers Congress: “to...provide for the common Defence...of the United States; to define and punish...offenses against the Law of Nations; to declare War...and make Rules concerning Captures on Land and Water; [and] to make Rules for the Government and Regulation of the land and naval Forces.”¹³ Additionally, Congress has the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution.”¹⁴ Thus, the Constitution grants Congress the power to enact laws for the conduct of war, and laws that define and punish offenses against the law of nations.¹⁵

In 1950, Congress enacted the Uniform Code of Military Justice (U.C.M.J.), the primary system of justice for the United States Armed Forces.¹⁶ The U.C.M.J. provides for the use of military commissions for the trial and punishment of offenses committed in violation of the law of war.¹⁷ Specifically, Article 21 gives military commissions concurrent jurisdiction, with courts-martial, over “offenders or offenses that by statute or by the law of war may be tried by military commissions.”¹⁸ The common law of war provides that unlawful combatants may be tried and punished by a military commission.¹⁹ Thus, by enacting Article 21, Congress has authorized the use of military commissions to try and punish unlawful combatants as well as other violators of the law of war.²⁰

Article II, Section 2 of the Constitution designates the President as the Commander in Chief of the Army and Navy of the United States.²¹ The President also has the duty to “take care that the Laws be faithfully executed.”²² “The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by

¹² See *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942). Note: In 1950, Congress enacted the Uniform Code of Military Justice. Article 21 of the Uniform Code of Military Justice is derived from Article 15 of the Articles of War which is discussed in *Quirin* and *Yamashita*.

¹³ U.S. CONST. art. I, § 8, cl. 1, 10-14.

¹⁴ *Id.* art. I, § 8, cl. 18.

¹⁵ See *Quirin*, 317 U.S. at 26.

¹⁶ 10 U.S.C. §801-946 (2000); Stephen Young, *United States Military Commissions: A Quick Guide to Available Resources*, LAW LIBRARY RESOURCE XCHANGE, March 1, 2002, available at <http://www.llrx.com/features/military.htm>.

¹⁷ 10 U.S.C. §801-946; See *Quirin*, 317 U.S. at 27.

¹⁸ 10 U.S.C. §821 (2000).

¹⁹ See *Quirin*, 317 U.S. at 31.

²⁰ See *id.*

²¹ U.S. CONST. art. II, § 2.

²² *Id.* art. II, § 3.

Congress for the conduct of war...and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.”²³

A formal declaration of war, however, is not the *sine qua non* of the President’s power to conduct military commissions. Both the Supreme Court and Congress have in the past acknowledged that a state of war may exist despite the absence of a formal declaration of war.²⁴ Commissions and analogous tribunals have been utilized during various conflicts where Congress has not formally declared war.²⁵ As the ABA Task force on Terrorism and the Law pointedly observed in its Report and Recommendations on Military Commissions, “Nothing in Article 21 or elsewhere in the U.C.M.J. or other statutes explicitly limits or permits the use of military commissions when war has not been declared.”²⁶

Military commissions have been recognized by the Supreme Court as a constitutional means of trying individuals who violate the law of war. In *Madsen v. Kinsella*, the Supreme Court discussed the history of military commissions noting that “since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities relating to war.”²⁷

In *Ex Parte Quirin*, the Court upheld the jurisdiction of a military commission convened in the United States to try eight German soldiers who came to the United States surreptitiously on June 17, 1942 to destroy war industries and facilities.²⁸ Upon their arrival, they buried their uniforms on the beach and entered the country in civilian clothes.²⁹ By the Order of July 2, 1942, the President appointed a military commission to try the German soldiers for violations of the law of war.³⁰ The United States Supreme Court held that Congress, by enacting Article 15 of the Articles of War, had given military tribunals jurisdiction to try offenders for offenses which violated the law of war.³¹ The President’s Military Order was authorized by his position as Commander in Chief and by his duty to ensure the laws of the United States are faithfully executed.³² The German soldiers were charged as unlawful combatants for secretly entering enemy territory without uniforms with the intent of committing hostile acts and therefore were subject to

²³ *Quirin*, 317 U.S. 26.

²⁴ See ABA Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions*, January 4, 2002, at 5.

²⁵ See *id.*

²⁶ *Id.*

²⁷ *Madsen v. Kinsella*, 343 U.S. 341, 346

²⁸ See *Quirin*, 317 U.S. at 21, 48.

²⁹ See *id.* at 21.

³⁰ See *id.* at 22.

³¹ See *id.* at 28.

³² See *Quirin*, 317 U.S. at 28.

trial by a military commission.³³

Similarly, in *In re Yamashita*, the Supreme Court upheld the jurisdiction of a military commission to try a commander of the Japanese armed forces for failure to discharge his duty as commander.³⁴ He was charged with failing to prevent members of his command from committing brutal atrocities against unarmed noncombatant civilians.³⁵ The Court reasoned that Congress, by enacting Article 15 of the Articles of War, had recognized military commissions as an appropriate tribunal for the trial and punishment of offenses against the law of war.³⁶ The military commission had jurisdiction to try the Japanese commander because he was charged with a recognized war crime—failure to stop the killing of unarmed civilians by those in his command.³⁷ The Court found the military commission was authorized even though hostilities had ended, reasoning that before an official proclamation of peace a commission still has “the power to guard against the immediate renewal of the conflict and to remedy...the evils which the military operations have produced.”³⁸ Thus, the commission’s jurisdiction was upheld because the commander was charged with a war crime before peace was officially declared.³⁹

In *Johnson v. Eisentrager*, the Supreme Court concluded that the defendants were not entitled to federal judicial review because they were nonresident enemy aliens with no nexus to the United States.⁴⁰ The defendants—twenty-one German nationals—were charged with collecting and furnishing intelligence information to the Japanese after Germany had surrendered, but before Japan had surrendered.⁴¹ After the Japanese surrendered, the defendants, who were stationed in China when the acts occurred, were arrested and tried by a United States military tribunal convened in China.⁴² The Court held that nonresident enemy aliens with no nexus to the United States are not entitled to the protection of the United States Constitution or the United States courts.⁴³ Such protection is provided to nonresident aliens with a nexus to the United States because by permitting their presence in the country such protection is implied.⁴⁴ The Court noted that if the Fifth Amendment protected enemy aliens they would

³³ *See id.* at 35.

³⁴ *See Yamashita*, 327 U.S. at 14.

³⁵ *See id.*

³⁶ *See id.* at 7.

³⁷ *See id.*

³⁸ *See id.* at 12.

³⁹ *See Yamashita*, 327 U.S. at 12.

⁴⁰ *See Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950).

⁴¹ *See id.* at 766.

⁴² *See id.*

⁴³ *See Eisenstrager*, 339 U.S. 763.

⁴⁴ *See id.* at 777.

have more protection than United States soldiers.⁴⁵

Collectively, these cases establish that the President is authorized during a time of war to create a military commission to try enemy aliens for violations of the law of war. Furthermore, it highlights how nonresident enemy aliens with no nexus to the United States are unlikely to be granted habeas review of their convictions or sentences by United States federal courts.

Although Congress did not formally declare war after the events of September 11, 2001, they did authorize the use of military force.⁴⁶ On September 18, 2001, Congress passed a joint resolution authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organization or persons, in order to prevent any further acts of international terrorism, against the United States by such nations, organization or persons.”⁴⁷ The terrorist attacks waged on the United States on September 11, 2001, clearly created a state of war. Furthermore, the Joint Resolution authorizes the use of necessary and appropriate force in response to such attacks. Thus, the President is authorized by his position as Commander in Chief and Article 21 of the U.C.M.J. to order the use of military commissions for trying individuals who are charged with violating the law of war.

B. Opposition

Despite the Constitution, statutes, and strong precedent in favor of the legality and appropriateness of military commissions, many have voiced opposition to the institution of these commissions. Those opposed to the commissions have challenged the manner in which the President’s Military Order was issued, the text and breadth of the Order, the venue of the Order, the consequences of the Order for foreign nationals, and the legal basis of the Order.

Opposition has been directed at the manner in which the commissions were initially formed. Some scholars have declared that the commissions are creatures of a “presidential fiat” with no involvement by Congress.⁴⁸ Yale Law

⁴⁵ See *id.* 783.

⁴⁶ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat 224 (2001); See Jeffrey F. Addicott, *Military Tribunals are Constitutional*, JURIST, March 26, 2002, available at <http://jurist.law.pitt.edu/forum/forumnew51.php>.

⁴⁷ Authorization for Use of Military Force, 115 Stat at 224.

⁴⁸ *A Better Tribunal, But to What End?*, Editorial, BALT. SUN, March 26, 2002. See also *Bush Rules for Military Tribunals Fail to Address Four Important Issues, Says Cato Scholar*, CATO INSTITUTE, March 21, 2002, available at <http://www.cato.org/new/03-02/03-21-02r.html>; (stating “As it now stands, the Bush military order shows too little respect for separation of powers, a centerpiece of our Constitution. The executive branch sets the rules, then prosecutes, and then has sole review authority—unchecked power in a single branch of government.”).

School Professor Judith Resnik described the process as a “grab of power by a single branch” with a disregard for the separation of powers doctrine.⁴⁹ Resnik states a more appropriate procedure would have been to circulate the President’s Military Order to Congress for notice and comment and then alter it accordingly.⁵⁰ The President’s Military Order, with its supposed unilateral nature, has also been accused of setting up a system wherein, according to Human Rights Watch, “the president [acts as]... prosecutor and judge.”⁵¹

Opposition to the commissions has also focused on the lack of specificity in the language of the President’s Military Order⁵² and has expressed fear as to the potential breadth of the Order.⁵³ For example, one argument presented states that commissions should only be used to prosecute unlawful combatants, not to prosecute those “tangentially related to international terrorism.”⁵⁴ Others have expressed concern as to who may be considered to be involved in international terrorism—citing a need for a specifically defined and limited answer to that question.⁵⁵ In addition, there has been criticism of the President’s Military Order’s failure to address the issue of the potential indefinite detention of those subject to the order.⁵⁶ One law professor has noted the British in Northern Ireland employed a similar procedure of indefinite detention.⁵⁷

The venue of the military commissions has also been challenged. Robert Levy, of the Cato Institute, argues the commissions should only be used outside of the United States.⁵⁸ He claims that within the United States, criminal courts, not military commissions, are the appropriate venue.⁵⁹ Some fear by using these commissions within the United States, the nation will lose its legitimacy when protesting against other countries’ use of similar tribunals—especially when such tribunals are trying United States citizens.⁶⁰ The ABA Resolution on Military

⁴⁹ Judith Resnik, *Legal Times*, January 14, 2002, available at http://www.law.yale.edu/yls/etc-article.jsp?c_id=185.

⁵⁰ *Id.*

⁵¹ See Jim Lobe, *Military Tribunals Fall Short of Standard, Say U.S. Rights Groups*, ONEWORLD US, March 22, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/oneworld/20020322/wl_oneworld/1032_1016804891.

⁵² *Tribunals Tweaked*, Editorial, CLEVELAND PLAIN DEALER, March 25, 2002.

⁵³ See *A Better Tribunal, But to What End?*, Editorial, BALTIMORE SUN, March 26, 2002.

⁵⁴ *Bush Rules for Military Tribunals Fail to Address Four Important Issues, Says Cato Scholar*, CATO INSTITUTE, March 21, 2002, available at <http://www.cato.org/new/03-02/03-21-02r.html>.

⁵⁵ See *A Better Tribunal, But to What End?*, Editorial, BALTIMORE SUN, March 26, 2002.

⁵⁶ See *Tribunals Tweaked*, Editorial, CLEVELAND PLAIN DEALER, March 25, 2002.

⁵⁷ See Sue Fleming, *Legal Experts Question Military Tribunals*, REUTERS, March 22, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/nm/20020322/pl_nm/attack_tribunals_dc_13.

⁵⁸ *Bush Rules for Military Tribunals Fail to Address Four Important Issues, Says Cato Scholar*, CATO INSTITUTE, March 21, 2002, available at <http://www.cato.org/new/03-02/03-21-02r.html>.

⁵⁹ *Id.*

⁶⁰ See Jim Lobe, *Military Tribunals Fall Short of Standard, Say U.S. Rights Groups*, ONEWORLD US, March 22, 2002, available at <http://story.news.yahoo.com/news?tmpl=story&u=/oneworld/>

Tribunals counsels the President “to give full consideration to the impact of [his] choices as precedents in (a) the prosecution of U.S. citizens in other nations and (b) the use of international legal norms in shaping other nations’ responses to future acts of terrorism.”⁶¹

Criticism of the commissions has not been limited to domestic sources, but has also come from allies abroad. France, who has citizens currently detained among the Taliban and al-Qaeda at Guantanamo Bay, Cuba, has requested its citizens be returned home to be tried in French courts as opposed to adjudication by military commissions of the United States.⁶² Turkey’s establishment newspaper has compared the military commissions to its own severe DGM state security courts—“The United States is founding special military courts with no appeal and a guaranteed death sentence for al-Qaeda and Taliban members that will make our DGMs pale into insignificance.”⁶³ The presence of the death penalty as a potential sentence has also been poorly received in Europe and beyond.⁶⁴ Amnesty International has accused the United States of creating a discriminatory system in which military commissions would not try United States citizens but would try foreigners.⁶⁵

Finally, criticism has been directed toward the legal precedent used to justify commissions. For example, Professor Resnik argues that “war cases” like *Quirin*, *Hirabayashi*, and *Korematsu* are “old” cases whose meaning (and willingness to infringe upon civil rights during war time) were diminished by the newer due process jurisprudence and by equality law cases such as *Brown v. Board of Education*.⁶⁶ Professor Jordan Paust cites *Ex Parte Quirin* and *In re Yamashita* for the proposition that the President’s Commander in Chief power to establish military commissions ends when the “war” ends.⁶⁷ Paust argues that consequently it may not be the best long-term solution to set up these military

20020322/wl_oneworld/1032_1016804891.

⁶¹ ABA Resolution on Military Tribunals, February 4, 2002.

⁶² *Allies Watchful on U.S. Al Qaeda Tribunal Plans*, REUTERS, March 22, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/nm/20020322/wl_nm/attack_tribunals_world_dc_1.

⁶³ See *id.*

⁶⁴ See Sue Fleming, *Legal Experts Question Military Tribunals*, REUTERS, March 22, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/nm/20020322/pl_nm/attack_tribunals_dc_13.

⁶⁵ See Andres Cala, *Detainees Told About Tribunal Plans*, ASSOCIATED PRESS, March 22, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/ap/20020322/ap_on_re_la_am_ca/guantanamo_prison_389.

⁶⁶ Judith Resnik, *Legal Times*, January 14, 2002, available at http://www.law.yale.edu/yls/etc-article.jsp?c_id=185.

⁶⁷ See Jordan Paust, *Military Commissions: Some Perhaps Legal, But Most Unwise*, JURIST, November 14, 2001, available at <http://jurist.law.pitt.edu/forum/forumnew38.htm>.

commissions; rather he suggests a regional or international criminal court with jurisdiction over terrorists as a more appropriate long-term solution.⁶⁸

A letter to Senator Patrick Leahy from law professors opposing military commissions summarized the opposition.⁶⁹ The letter claims that the President's Military Order: undermines the doctrine of separation of powers, fails to comply with constitutional due process standards, allows the President to violate international treaties, is not necessary to the successful prosecution of terrorists, is not supported by legal precedent, and destabilizes the government's ability to protest other countries' violation of civil rights.⁷⁰

C. Response to the Opposition

Despite the criticism of the military commissions, and their characterization as "second-class justice,"⁷¹ military commissions and their corresponding rules, as the Secretary of Defense noted, will ensure "just outcomes" while protecting the United States and its citizens⁷² as well as the rights of the suspected terrorists.⁷³ The commissions are constitutional, supported by judicial precedent, and are an appropriate means to deal with suspected terrorists.

The use of military commissions comports with the text of the Constitution. The Fifth Amendment requires the use of a grand jury for indictment except in "cases arising in the land or naval forces."⁷⁴ Professor John Eastman notes that "it would be odd indeed to read the Fifth Amendment as affording greater access to civilian courts to non-uniformed soldiers of terrorism waging war on the United States than it provides to our own soldiers."⁷⁵

Furthermore, the President's "unilateral" issuance of the President's Military Order is well within his constitutional powers. As Commander in Chief, the President derives certain powers during times of military crisis.⁷⁶ In addition,

⁶⁸ *See id.*

⁶⁹ *Law Professors Oppose Military Tribunals for Terrorists*, JURIST, December, 2002, available at <http://jurist.law.pitt.edu/terrorism/terrorismmilprof.php>.

⁷⁰ *See id.*

⁷¹ *See* Andres Cala, *Detainees Told About Tribunal Plans*, ASSOCIATED PRESS, March 22, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/ap/20020322/ap_on_re_la_am_ca/guantanamo_prison_389.

⁷² Toni Locy, *Pentagon Issues Tribunal Rules*, USA TODAY, March 22, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/usatoday/20020322/ts_usatoday/3963008.

⁷³ *Tribunals Pass the Test*, DENVER POST, Editorial, March 23, 2002, available at <http://www.denverpost.com/Stories/0,1002,417%257E480801,00.html>.

⁷⁴ John Eastman, *Military Tribunals are Perfectly Constitutional*, Claremont Institute Center for Constitutional Jurisprudence (available at <http://www.claremont.org/publications/eastman011129.cfm>).

⁷⁵ *Id.*

⁷⁶ *See id.*

the Executive's plenary powers and duty to assure the faithful execution of the laws of the country allow the President to establish the military commissions in order to protect the country and its citizens.⁷⁷ The Supreme Court's holdings in *Quirin*, *Yamashita* and *Eisentrager*, as well as 10 U.S.C. §§ 821 and 826, further establish the legality of the President's Military Order.⁷⁸

Military commissions are not only legal but are an appropriate means to deal with terrorists. Those who oppose military commissions unfairly assume that the military would bring a different sense of justice to a proceeding than a civil court would. Indeed, many safeguards for accused service members at courts-martial were part of the U.C.M.J. before similar rights were extended by the Supreme Court to civilian criminal trials.⁷⁹ As one commentator noted, he had "seen enough of the American system of military justice to know that its practitioners have at least as high a regard for traditional principles of justice as their civilian counterparts."⁸⁰

Military commissions are also an appropriate strategy since the current situation is a military conflict, not a criminal case. It would be a ridiculous scenario wherein a Marine burrowing through an Afghan cave would be forced to administer Miranda warnings to a suspected terrorist.⁸¹ Moreover, detention of captured terrorists is an essential and traditional aspect of military conflict—and such detention is not dependent on the charge of any crime.⁸² Professor Wedgwood characterizes the September 11th attacks as an act of war (as evidenced by the U.N. Security Council resolutions recognizing the United States' right to defend itself and the North Atlantic Treaty Organization's invocation of its collective self-defense clause)⁸³ and states that the decision to target civilians constitutes "a war crime of historic magnitude."⁸⁴ The appropriate venue for a war crime would be a military commission, especially given the federal courts' lack of experience in dealing with war crimes or prisoners of war.⁸⁵

The limits of the federal court system are also reasons why military commissions are the appropriate means for trying suspected terrorists. A trial in

⁷⁷ See *id.*

⁷⁸ See *supra* notes 16-46.

⁷⁹ *Tribunals Pass the Test*, DENVER POST, Editorial, March 23, 2002, available at <http://www.denverpost.com/Stories/0,1002,417%257E480801,00.html>.

⁸⁰ See *id.*

⁸¹ Ruth Wedgwood, *The Case for Military Tribunals*, Editorial, WALL STREET JOURNAL, December 3, 2001, available at http://crossroader.law.yale.edu/yls/etc-article.jsp?c_id=147.

⁸² See *id.*

⁸³ See Jeffrey F. Addicott, *Military Tribunals are Constitutional*, JURIST, March 26, 2002, available at <http://jurist.law.pitt.edu/forum/forumnew51.php>.

⁸⁴ Ruth Wedgwood, *The Case for Military Tribunals*, Editorial, WALL STREET JOURNAL, December 3, 2001, available at http://crossroader.law.yale.edu/yls/etc-article.jsp?c_id=147.

⁸⁵ See *id.*

federal court would endanger the lives of the jury members; mere anonymity would not be enough —“imagine assigning three carloads of federal marshals, rotated every two weeks, to protect each juror for the rest of his life.”⁸⁶ Professor Wedgwood implies that it was more than coincidence that the September 11th attack in New York City occurred the day before al-Qaeda members were to be sentenced in a courthouse in lower Manhattan.⁸⁷ In addition, the number of potential defendants would be a huge imposition on the federal courts; the cases would occupy numerous judges, force the sequestering of hundreds of individuals, and result in the delay of hundreds of cases.⁸⁸ Federal courts would also face evidentiary difficulties. In many cases, there would be the burdensome task of maintaining the secrecy of the record so as not to create national security risks. Also, because of the stricter evidence rules present in a federal court as opposed to in a military commission, it could be very difficult to present testimony against defendants. Witnesses would be scared to testify against terrorists,⁸⁹ and indirect evidence, like hearsay, would not be allowed in the record.⁹⁰

An international tribunal, like a U.S. federal court, is equally inappropriate. A lack of American representation on a panel of international judges is a potential problem—the desire for domestic justice is a real and justified sentiment.⁹¹ Moreover, the international tribunal in Yugoslavia has proceeded very slowly (9 years) and at great expense (\$400 million) with few results.⁹² An international tribunal would also be complicated by debate over the death penalty, secrecy of information and the ensuing national security issues, and potential violations of the defendants’ due process rights under different rules of procedure.⁹³

Chief Justice William Rehnquist spoke recently about the limitation of civil rights during times of military conflict.⁹⁴ He discussed Japanese internment cases and Lincoln’s severe measures during the Civil War and explained and justified them through the phrase “*Inter Arma Silent Leges*” (In times of war, the

⁸⁶ Ruth Wedgwood, *The Case for Military Tribunals*, Editorial, WALL STREET JOURNAL, December 3, 2001, available at http://crossroader.law.yale.edu/yls/etc-article.jsp?c_id=147.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See Sally Buzbee, *Tribunal Rules Protect US*, ASSOCIATED PRESS, March 21, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/ap/20020322/ap_on_go_ca_st_pe/military_tribunals_2; (quoting Secretary Rumsfeld that “in wartime it may be difficult to locate witnesses”).

⁹⁰ Ruth Wedgwood, *The Case for Military Tribunals*, Editorial, WALL STREET JOURNAL, December 3, 2001, available at http://crossroader.law.yale.edu/yls/etc-article.jsp?c_id=147.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See Jeffrey F. Addicott, *Military Tribunals are Constitutional*, JURIST, March 26, 2002, available at <http://jurist.law.pitt.edu/forum/forumnew51.php>.

⁹⁴ See Remarks of Chief Justice William Rehnquist at the 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association, May 3, 2000, available at http://supremecourtus.gov/publicinfo/speeches/sp_05-03-00.htm.

laws are silent).⁹⁵ He concluded by stating that while “to lawyers and judges, this may seem a thoroughly undesirable state of affairs... in the greater scheme of things it may be best for all concerned.”⁹⁶ Perhaps military commissions are not a pure or ideal administration of justice, but there is no doubt they are a legal and appropriate means of dealing with suspected terrorists, especially under the current circumstances.

III. Rules of Procedure & Critique

On March 21, 2002, the Secretary of Defense promulgated Military Commission Order No. 1, “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism.”⁹⁷ Military Commission Order No.1 implements the policy contained in the President’s Military Order by providing a legal framework for conducting commissions.⁹⁸ Among the issues addressed in Military Commission Order No. 1 are certain rights and procedures provided to individuals who face trial by a Commission.⁹⁹

To analyze the fairness of the incipient military commissions from the perspective that such commissions are both necessary and legal, eight of the most important procedures essential to a fair trial have been selected. These include: right to notice; right to counsel; right to a public trial; right to present witnesses and compel their attendance; right to confrontation/cross-examination of witnesses for the prosecution; right to reliable evidence; right to impartial decision-makers; and right to appeal.

The Manual for Courts-Martial (M.C.M.) and the Charter of the International Military Tribunal (and its application at the Nuremberg Trial) will be used to conduct critical analysis. Because courts-martial and military commissions share jurisdiction over the prosecution of war criminals,¹⁰⁰ the M.C.M. is an appropriate tool for comparison. In addition, because certain critics have questioned the fairness of the Commission, a comparison to other due process systems that have withstood domestic and international scrutiny is appropriate. Moreover, the Nuremberg Trial has been characterized as “the crossroads” of the law of war¹⁰¹ and is regarded as having provided predominantly

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ Military Commission Order No. 1.

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See* MANUAL FOR COURTS-MARTIAL (2000 ed.), Preamble.

¹⁰¹ Allan A. Ryan, Jr., Lecture, International Human Rights: Law of War, War Crimes, and Genocide, Boston College Law School, (Feb. 26, 2002).

fair procedures to its war criminal defendants.¹⁰² Therefore, the Charter of the International Military Tribunal and the conduct of the Nuremberg Trial provide additional means to analyze the procedures enunciated by Military Commission Order No. 1.

A. Right to Notice

Military Commission Order No. 1 provides for the Accused to be on notice of the charges. Section 6(A)(3) states “The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel.”¹⁰³ The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.”¹⁰⁴ More specifically, Section 5(A) states “The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English, and if appropriate, in another language that the Accused understands.”¹⁰⁵

The Manual for Courts-Martial provides for notification of the Accused of charges under Rule for Courts-Martial (R.C.M.) 308.¹⁰⁶ The only remedy for a violation of R.C.M. 308 is a continuance for enough time to permit the Accused to adequately prepare a defense.¹⁰⁷ Likewise, the Charter of the International Military Tribunal provided for notice to defendants of charges against them.¹⁰⁸

In all, Military Commission Order No. 1’s notice provision echoes the notice rights granted in the Manual for Courts-Martial and the Charter of the International Military Tribunal. By providing charges in both English and the language of the Accused, and by allowing the Accused sufficient time to prepare a defense, notice procedures to be followed by commissions are fair and comport with due process.

B. Right to Counsel

¹⁰² Allan A. Ryan, Jr., Lecture, International Human Rights: Law of War, War Crimes, and Genocide, Boston College Law School, (Mar. 5, 2002).

¹⁰³ See Department of Defense, Military Commission Order No. 1 § 6(A)(3).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 5(A).

¹⁰⁶ See R.C.M. 308(a).

¹⁰⁷ See R.C.M. 308(c).

¹⁰⁸ Article 16(a) of the Charter provided, “The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.” Charter of the International Military Tribunal, Art. 16(a).

Under Military Commission Order No. 1, individuals brought to trial will have a right to counsel.¹⁰⁹ This right to counsel includes a Detailed Defense Counsel, free of charge and the right to hire a qualified civilian attorney at no expense to the United States Government.¹¹⁰ Moreover, the individual has the option to replace Detailed Defense Counsel with another military attorney, if reasonably available.¹¹¹ However, if the individual hires Civilian Defense Counsel, the Detailed Defense Counsel is not relieved of the duty of representation.¹¹² Thus, the individual must be represented at all times by Detailed Defense Counsel.¹¹³ Military Commission No. 1 § 4(C)(2) states “The duties of the Detailed Defense Counsel are (a) to defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and (b) to represent the interests of the Accused in any review process as provided by this Order.”¹¹⁴

In similar fashion, the Manual for Courts-Martial provides an accused service member with the right to counsel.¹¹⁵ The government provides a military lawyer free of charge or the Accused may hire civilian counsel at no expense to the government.¹¹⁶ Moreover, the Accused has the right to military counsel of his or her own selection if reasonably available—Individual Military Counsel.¹¹⁷ If the Accused is represented by civilian counsel, military counsel will act as associate counsel unless excused at the request of the Accused.¹¹⁸

The Charter of the International Military Tribunal similarly provided that a defendant had the right to conduct his own defense before a tribunal or to have the assistance of an attorney.¹¹⁹ When the twenty-three defendants in Nuremberg were served with the indictment in October 1945, they were given a copy of the Charter and a list of counsel known to be available.¹²⁰ The defendants were permitted to choose from the list or request another attorney.¹²¹ The list did not exclude “Nazi, Communist, or vegetarian lawyers, for that matter.”¹²² The motivation for this broad freedom of choice, according to the American Justice on the Court, Francis Biddle, was “that these men must not be given the slightest

¹⁰⁹ See Military Commission Order No. 1 § 4(C).

¹¹⁰ See *id.* §§ 4(C)(2) and 4(C)(3)(b).

¹¹¹ See *id.* § 4(C)(3)(a).

¹¹² See *id.* § 4(C)(3)(b).

¹¹³ See Military Commission Order No. 1 § 4(C)(4).

¹¹⁴ *Id.* § 4(C)(2).

¹¹⁵ See M.R.E. 305, 321; R.C.M. 305 (f).

¹¹⁶ See 10 U.S.C. § 838(b) (2000); 10 U.S.C. § 827(a)(1); R.C.M. 506(a).

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See Charter of the International Military Tribunal, Art. 16(d).

¹²⁰ See 1 DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL 126 (1999).

¹²¹ See *id.*

¹²² JOSEPH E. PERSICO, NUREMBERG, INFAMY ON TRIAL 94 (1994).

excuse for protest afterward that they had been denied a fair trial.”¹²³ This flexibility resulted in twenty-six German attorneys who represented accused defendants and twelve who represented the accused organizations.¹²⁴

Military Commission Order No. 1’s right to counsel is less flexible than that of the Manual for Courts-Martial and the Charter of the International Military Tribunal. Unlike the right to counsel outlined in the Manual for Courts-Martial, the Accused under Military Commission Order No. 1 must be represented by Detailed Defense Counsel at all times, even if the defendant chooses Civilian Defense Counsel. Moreover, the Civilian Defense Counsel is not guaranteed access to closed Commission proceedings or to classified information. Military Commission Order No. 1 differs from the Charter of the International Military Tribunal in that the civilian attorney must meet specified criteria, notably, being a United States citizen.¹²⁵ When an individual to be tried before a Commission chooses an attorney who does not meet the criteria set forth in Military Commission Order No. 1, the attorney may be qualified on an *ad hoc* basis under Section 4(C)(3)(b).¹²⁶

The Commission’s right to counsel is a fair procedure for the following reasons. First, a defendant has the right to free counsel at all stages of the proceeding. Although this counsel may vary between military and civilian counsel depending on how high a particular proceeding is classified, the defendant will have representation throughout. Second, a defendant has a right to choose civilian counsel. Although the civilian counsel must meet criteria under Section 4(C)(3)(b), including being a United States citizen, the Commission may overlook these criteria by providing an *ad hoc* qualification. This procedure allows reprieve for a defendant who chooses civilian counsel who may not meet the criteria. Thus, Military Commission Order No. 1’s right to counsel is a fair process based on the free access of military counsel and right to choose civilian counsel.

C. Right to a Public Trial

¹²³ *Id.*

¹²⁴ See 1 SPRECHER, *supra* note 123, at 126.

¹²⁵ “The Accused may also retain the services of a civilian attorney of the Accused’s own choosing and at no expense to the United States Government, (“Civilian Defense Counsel”), provided that attorney: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal Court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures proscribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. See Department of Defense, Military Commission Order No. 1, § 4(C)(3)(b).

¹²⁶ See Military Commission Order No. 1 § 4(c)(3)(b).

Military Commission Order No. 1 provides an Accused with the right to a public trial. Section 6(B) states that “The Commission shall...(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President’s Military Order...”¹²⁷ At the discretion of the Appointing Authority, open proceedings may include attendance of the public and accredited press.¹²⁸ Additionally, the transcripts will be released at the appropriate time.¹²⁹

At court-martial, an accused service member has the right to a public trial.¹³⁰ A session of a court-martial may only be closed to the public over the objection of the Accused in limited situations expressly authorized in the Manual for Courts-Martial.¹³¹ Although the Charter of the International Military Tribunal did not explicitly contain a right to a public trial, the Nuremberg trial had a press gallery for 250 correspondents in addition to 150 seats available for other spectators.¹³²

The right under Military Commission Order No. 1 Section 6(B) for the “attendance of the public and accredited press to a public trial” is similar to the right afforded a member of the armed forces under R.C.M. 806 and the right to press and spectators extended at the Nuremberg Trial. Also, Military Commission Order No. 1’s provision allowing the trial to be closed when issues of national security arise is analogous to the procedures which allow the closure of a court-martial under the Military Rules of Evidence.¹³³ By providing a forum that is predominantly open to the public, Military Commission Order No. 1 comports with the essential elements of a fair trial.

D. Right to Present Witnesses & Compel Their Attendance

Section 5(H) of Military Commission Order No. 1 provides for the Accused to obtain witnesses and documents for his defense “to the extent necessary and reasonably available as determined by the Presiding Officer.”¹³⁴ To these ends,

¹²⁷ See Military Commission Order No. 1 §§ 6(B)(2) and 6(B)(3). Moreover, “Grounds for closure include information classified or classifiable under [Executive Order 12958, “Classified National Security Information”]; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods or activities; and other national security interests.” See Military Commission Order No. 1 § 6(B)(3).

¹²⁸ See *id.* § 6(B)(3).

¹²⁹ *Id.*

¹³⁰ See R.C.M. 806.

¹³¹ See *id.*

¹³² PERSICO, *supra* note 125, at 128.

¹³³ See M.R.E. 505; M.R.E. 506.

¹³⁴ Military Commission Order No. 1 § 5(H). Such access is limited by the provisions of the Military Commission Order that pertain to the safeguarding of classified or otherwise protected material. See *id.*

the Appointing Authority of a Commission is required to make available resources to the Defense that the “Appointing Authority deems necessary for a fair and full trial.”¹³⁵ A Commission shall have the power, in the name of the Department of Defense, to summon witnesses to attend trial and testify.¹³⁶ The Presiding Officer shall exercise these powers, *inter alia*, at the request of the Defense, to ensure a full and fair trial in accordance with both the President’s Military Order and the Military Commission Order No 1.¹³⁷ The Accused may also have his defense counsel present evidence at trial,¹³⁸ and the testimony of any witness offered by either the Prosecution or the Defense shall be received by the Commission if it finds the testimony to be admissible and non-cumulative.¹³⁹

The provisions in the Manual for Courts-Martial regarding the right to present witnesses and compel their attendance are similar to those contained in Military Commission Order No.1. Each party in a court-martial is entitled to a full opportunity to present evidence.¹⁴⁰ Moreover, the Rules for Courts-Martial provide that “The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.”¹⁴¹ At a court-martial, however, the defense submits a list of their requested witnesses to the prosecution, which can challenge any witness’s production on the grounds that production is not required under the rules (i.e. not relevant or necessary).¹⁴² Should the prosecution challenge the production of a defense witness, the military judge, upon motion by the defense, will resolve the issue.¹⁴³ Courts-martial may require the presence of civilian witnesses by subpoena.¹⁴⁴ Foreign nationals are not subject to a court-martial subpoena, but their presence may be obtained through the cooperation of the host nation.¹⁴⁵ In occupied territory, however, the presence of civilian witnesses located within the occupied territory may be compelled by the appropriate commander.¹⁴⁶

The Charter of the International Military Tribunal instructed the Tribunal “to ask the prosecution and the defense what evidence (if any) they wish to submit to the tribunal....”¹⁴⁷ The Charter also empowered the Tribunal to summon

¹³⁵ *See id.*

¹³⁶ *See id.* § 6(A)(5)(a).

¹³⁷ *See id.* § 6(A)(5).

¹³⁸ *See id.* § 5(I).

¹³⁹ *See* Military Commission Order No. 1 § 6(D)(2)(a).

¹⁴⁰ *See* R.C.M. 913(c).

¹⁴¹ R.C.M. 703(a).

¹⁴² *See* R.C.M. 703(c).

¹⁴³ *See id.*

¹⁴⁴ *See* R.C.M. 703(e)(2)(A).

¹⁴⁵ *See id.*, Discussion.

¹⁴⁶ *See* R.C.M. 703(e)(2)(E)(iii).

¹⁴⁷ Charter of the International Military Tribunal, Art. 24(d).

witnesses and require their attendance and testimony.¹⁴⁸ As the Nuremberg Trial proceeded, Chief Judge Lawrence announced that the Tribunal would deal with a proposed defense witness by first hearing the proponent on the relevancy of the proposed testimony and then allowing the Prosecution to respond.¹⁴⁹

Military Commission Order No.1's creation of an Accused's right to present witnesses and compel attendance is fair and dovetails closely with both the procedures utilized at United States courts-martial and those implemented at the International Military Tribunal. By allowing the Accused to obtain witnesses and mandating that resources be provided to facilitate their testimony at trial, the procedures provide the Accused a reasonable opportunity to present a meaningful defense.¹⁵⁰ Moreover, the requirement that the Commission serve as a gatekeeper in determining which defense witnesses' testimony would be relevant is not troublesome. Both the procedures used at a court-martial of a United States service member and the International Military Tribunal, entail or entailed some involvement of the court and the prosecution on the determination of which proposed defense witnesses will be produced.¹⁵¹

E. Right to Confrontation/Cross-Examination of Witnesses for the Prosecution

Individuals brought to trial before a military commission under Military Commission Order No. 1 will enjoy an unimpeded right of cross-examination.¹⁵² An Accused's right to confront the witnesses against him, however, may be curtailed in certain circumstances.¹⁵³ Military Commission Order No. 1 § 5(K) states "The Accused may be present at every stage of the trial before the commission, consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion

¹⁴⁸ See *id.*, Art. 17.

¹⁴⁹ See 2 SPRECHER, *supra* note 123, at 734-35. This ruling was implemented over the objection of counsel for defendant Joachim von Ribbentrop, who argued that it would be unfair for the Prosecution to participate in determining which proposed defense witnesses and documents were relevant. See *id.*

¹⁵⁰ As it is quite possible, if not probable, that Commissions will be convened at Guantanamo Bay, Cuba, far from the battlefield of Afghanistan, the allocation of such resources to the defense is essential.

¹⁵¹ See R.C.M. 703; 2 SPRECHER, *supra* note 123, at 734-35. As a practical matter, however, it must be understood that a Commission's ability to *compel* the attendance of a witness for the defense is limited. Issued in the name of the Department of Defense, a Commission subpoena for a witness located outside the territorial jurisdiction of the United States will have no effect without the cooperation of a nation with jurisdiction over the individual. Such a limitation, however, can hardly be termed as unfair, as an American service member tried before a court-martial would face the same difficulties in compelling the appearance of a foreign civilian located abroad.

¹⁵² See Military Commission Order No. 1 § 5(I). Section 5(I) provides that, "The Accused may have Defense Counsel...cross-examine each witness presented by the Prosecution who appears before the Commission." *Id.*

¹⁵³ See *id.* § 5(K).

thereof.”¹⁵⁴ In turn, Section 6(B)(3) allows for the closure of proceedings, including the exclusion of the Accused and Civilian Defense Counsel, to protect classified information, the physical safety of Commission participants, intelligence and law enforcement sources, methods or activities, and other national security interests.¹⁵⁵

In comparison, the Manual for Courts-Martial provides for cross-examination of witnesses who testify for either party.¹⁵⁶ The scope of cross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness.¹⁵⁷ An accused service member also enjoys the right to be present at every stage of a court-martial including sessions held outside the presence of the court members.¹⁵⁸ Moreover, although M.R.E. 505 contains elaborate procedures by which the government can move to prevent full disclosure of classified information to an accused service member, the rule does not provide for the exclusion of the Accused when classified evidence is presented at trial.¹⁵⁹

The Charter of the International Military Tribunal similarly provided defendants “the right through himself or through counsel to...cross-examine any witness called by the Prosecution.”¹⁶⁰ With regard to the confrontation of witnesses, Article 12 of the Charter permitted the conduct of proceedings against a defendant, “...in his absence, if he has not been found or if the Tribunal for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.”¹⁶¹

The procedure in Military Commission Order No. 1 that allows the exclusion of the Accused from closed sessions but, at the same time, ensures the presence of military defense counsel, has been criticized as unduly hampering the

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* § 6(B)(3).

¹⁵⁶ *See* R.C.M. 914(c)(2), Discussion.

¹⁵⁷ *See* M.R.E. 611(b). The military judge has discretion to permit inquiry into additional matters on cross-examination as if on direct examination. *See id.*

¹⁵⁸ *See* MRE 804(a). Under certain circumstances in cases involving abuse of a child or domestic violence, a child victim or witness may testify outside the courtroom. *See* M.R.E. 611(d). In such a situation, however, the Accused is entitled to monitor the remote testimony from the courtroom. *See* R.C.M. 914A(a)(3).

¹⁵⁹ *See* M.R.E. 505.

¹⁶⁰ Charter of the International Military Tribunal, Art. 16(e). However, at the Nuremberg trial, after the Prosecution’s first witness was cross-examined by eight counsel for the defense, the Court ruled that defendants who were represented by counsel did not have the right to cross-examine witnesses themselves. *See* 2 SPRECHER, *supra* note 123, 731. To draw attention to the Charter’s variance from the continental system regarding cross examination, defense counsel were admonished by Chief Judge Geoffrey Lawrence that it would be their function, and not that of the judges, to cross-examine prosecution witnesses. *See* ROBERT E. CONOT, JUSTICE AT NURMEBERG 86-87 (1983).

¹⁶¹ Charter of the International Military Tribunal, Art. 12.

defense.¹⁶² This rule, however, is a necessary compromise. On the one hand, it ensures that at least one member of the defense team is made aware of and can act on all evidence presented against the Accused. Indeed, "...no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel."¹⁶³ On the other hand, as required by Military Commission Order No. 1,¹⁶⁴ the rule protects classified information, the United States' intelligence methods and sources, and the physical safety of commission participants. Though the Military Rules of Evidence, which are applied at courts-martial, do not restrict an accused service member's presence at sessions closed for national security purposes,¹⁶⁵ service members are seldom participants in international conspiracies against the interests of the United States. Moreover, Article 12 of the Charter of the International Military Tribunal established the precedent that proceedings against war criminals may be undertaken in their absence, if deemed necessary by the tribunal.¹⁶⁶

F. Right to Reliable Evidence

Military Commission Order No. 1 contains a number of provisions pertaining to the standards for evidence that will be applied by a Commission.¹⁶⁷ With regard to admissibility, the Military Commission Order mirrors the language of the President's Military Order when it states:

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.¹⁶⁸

The Order specifies that testimony will be given under oath or affirmation, but a Commission may still hear a witness who refuses to do so, provided that the Commission takes that refusal into account when determining the weight of the testimony.¹⁶⁹ Moreover, a Commission may consider other forms of evidence including "...testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports."¹⁷⁰

¹⁶² See David E. Rovella, *Tribunal Rules Don't End Debate on Fairness*, THE NATIONAL LAW JOURNAL, Mar. 25, 2002 at <http://www.nlj.com>.

¹⁶³ Military Commission Order No. 1 § 6(D)(5)(B).

¹⁶⁴ See President's Military Order § 7(a)(1).

¹⁶⁵ See M.R.E. 505.

¹⁶⁶ See Charter of the International Military Tribunal, Art. 12.

¹⁶⁷ Military Commission Order No. 1 § 6(D). See President's Military Order § 4(c)(3).

¹⁶⁸ See *id.* § 6(D)(1).

¹⁶⁹ See *id.* § 6(D)(2)(b).

¹⁷⁰ See *id.* § 6(D)(3).

Conversely, Article 19 of the Charter of the International Military Tribunal expressly provided, “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.”¹⁷¹ At Nuremberg, Chief United States Prosecutor Robert Jackson, seized upon Article 19 prohibitions against formal rules of evidence and instituted a prosecution strategy that depended primarily on documentary evidence.¹⁷² Jackson viewed the hearsay nature of such documents as a benefit for the prosecution, for as one account has noted, “Jackson had enough courtroom experience to know there can be little argument with a document, and it cannot be cross-examined.”¹⁷³

With its “probative value to a reasonable person” standard for admissibility and the apparent acceptance of hearsay evidence, Military Commission Order No. 1 establishes an evidentiary scheme much closer to that used at Nuremberg than to the rules of evidence applied at courts-martial of the United States, which mirror the federal rules of evidence. There are important policy reasons that justify different evidentiary standards at a Commission than one would find at a court-martial. For instance, as a recent editorial observed, “It’s impossible to preserve the chain of evidence...when the documentation comes from papers found scattered in a bombed-out enemy camp. And the protections against hearsay...could wipe out credible battlefield testimony from those who did not survive battle to appear before the court, or whose identification might well imperil national security.”¹⁷⁴ A regime by which “anything comes in,” however, would undercut both the President’s and the Secretary of Defense’s directives, that those who undergo trial before a Commission receive “a full and fair trial.”¹⁷⁵ Therefore, any hearsay evidence that the prosecution seeks to introduce against the Accused should be conditioned on its ability to meet a minimum threshold of reliability. Such a moderate check against the admission of unreliable evidence could be patterned along the lines of the residual exception to the hearsay rule found in the Military Rules of Evidence, which allows the admission of otherwise hearsay statements:

¹⁷¹ Charter of the International Military Tribunal, Art. 19.

¹⁷² See 1 SPRECHER, *supra* note 123, at 69; TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 243 (1992).

¹⁷³ ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 101 (1984).

¹⁷⁴ *Tribunals Tweaked*, Editorial, THE CLEVELAND PLAIN DEALER, Mar. 25, 2002, *available at* http://www.cleveland.com/editorials/plaindealer/index.ssf/?xml/story.ssf/html_standard.xml?/base/opinion/10170523041826871.xml.

¹⁷⁵ See President’s Military Order § 4(c)(2); Military Commission Order No. 1 § 1.

if the court determines (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence.¹⁷⁶

If such an approach were adopted, Commissions could still consider the vast majority of the evidence presented by the prosecution, but at the same time, the Accused would receive a modicum of protection against unreliable evidence.

G. Right to Impartial Decision Makers

Military Commission Order No. 1 provides that the Secretary of Defense or an appointed designee may issue orders appointing the members and alternate members of each Commission.¹⁷⁷ A Presiding Officer, also appointed by the Secretary of Defense or an appointee, shall preside over the proceedings of each commission.¹⁷⁸ Section 4(A)(4) states that “The Presiding Officer must be a Military officer who is a judge advocate of any United States armed forces.” The Commission shall consist of at least three, but no more than seven members,¹⁷⁹ and each must be a commissioned officer of the United States Armed Forces.¹⁸⁰ Section 6(B)(2) requires the Commission “to proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary delays.”¹⁸¹

At a court-martial, the Accused has a constitutional right to an impartial military judge.¹⁸² Moreover, the Manual for Courts-Martial also allows an Accused to be tried by court members.¹⁸³ U.C.M.J. Article 25 (d) (2) provides for the selection of court members as follows:

When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified or the duty by

¹⁷⁶ M.R.E. 807.

¹⁷⁷ Military Commission Order No. 1. § 4(A)(1).

¹⁷⁸ *See id.* § 4(A)(4).

¹⁷⁹ *Id.* § 4(A)(2).

¹⁸⁰ *See* Military Commission Order No. 1 § 4(A)(3).

¹⁸¹ *Id.* § 6(B)(2).

¹⁸² 2 FRANCIS A. GILLIGAN & FREDERICK I. LEDERER, COURT MARTIAL PROCEDURE 554 (*citing* Ward v. Monroeville, 409 U.S. 57 (1972)).

¹⁸³ 2 GILLIGAN & LEDERER, *supra* note 185, at 2.

reason of age, education, training experience, length of service, and judicial temperament.¹⁸⁴

The convening authority's selection of court members may be challenged, however, if the convening authority systematically excludes a group of qualified service members for an inappropriate reason.¹⁸⁵ As a further check against biased decision-makers, U.C.M.J. Article 37 proscribes coercion or other unauthorized influence by a convening authority or other commander upon a court-martial or any member thereof.¹⁸⁶

Although both Military Commission Order No. 1 and the Manual for Courts-Martial address the importance of an impartial decision maker, there are differences in the style and depth in which this right is discussed. Military Commission Order No. 1 laconically states that the Commission will exclude irrelevant evidence and proceed impartially. The Manual for Courts-Martial, for its part, goes to great lengths to ensure an impartial military judge and unbiased court members. Indeed, Article 37(a) of the U.C.M.J. sternly prohibits attempts by commanders to unlawfully influence a court-martial's decision makers. In all, Military Commission Order No. 1 explicitly provides for impartial decision makers, but does not address it with the depth of the Manual for Courts-Martial. Despite Military Commission Order No. 1's brevity on the issue, there can be no dispute that Commissions have been specifically directed to proceed with impartiality.

H. Right to Appeal

After a trial before a Commission, the Presiding Officer is required to forward the record of trial to the Appointing Authority, who after conducting an administrative review to ensure that the proceedings were complete, is to transmit the record to a Review Panel.¹⁸⁷ The Review Panel consists of three military officers designated by the Secretary of Defense and at least one of the members must have experience as a judge.¹⁸⁸ The Review Panel's mandate is to review the record of trial, and in its discretion, any written submissions from the Prosecution or the Defense. Thereafter, within thirty days either forward the case to the Secretary of Defense with a recommendation as to disposition or return the case to the Appointing Authority for further proceedings if a majority of the panel has

¹⁸⁴ 10 U.S.C. § 825 (d)(2) (2000).

¹⁸⁵ R.C.M. 912(b)(1).

¹⁸⁶ See 10 U.S.C. § 837(a) (2000).

¹⁸⁷ See Military Commission Order No. 1 § 6(H)(1), 6(H)(3). If the Secretary of Defense is the Appointing Authority, then the record is to be transmitted directly to the Review Panel. See *id.* § 6(H)(1).

¹⁸⁸ See *id.* § 6(H)(4). The panel, however, may include civilians commissioned pursuant to 10 U.S.C. § 601. See *id.*

formed a definite and firm conviction that a material error of law occurred.¹⁸⁹ Military Commission Order No. 1 instructs the Review Panel to “disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission.”¹⁹⁰ Upon receiving the record of trial and recommendations from the Review Panel, the Secretary of Defense must either return the record for further proceedings, forward the case to the President with a recommendation as to disposition or, if pursuant to presidential designation, make the final decision in the case.¹⁹¹

The U.C.M.J. provides an appellate process for service members convicted at courts-martial that is significantly different than the post-trial procedures presented in Military Commission Order No. 1. After a court-martial, the findings and sentence are to be reported to the convening authority.¹⁹² After providing the accused service member the requisite time to submit additional matters for consideration, the convening authority *must* take action on the sentence¹⁹³ and *may* take action on the findings.¹⁹⁴ Beyond the convening authority’s action, the U.C.M.J. provides an appellate framework that includes potentially three levels of review—the Court of Criminal Appeals of the different armed services,¹⁹⁵ the Court of Appeals for the Armed Forces (C.A.A.F.)¹⁹⁶ and the United States Supreme Court by *writ of certiorari*.¹⁹⁷

In contrast, the Charter of the International Military Tribunal contained limited access to appellate review. Article 26 provided “The judgment of the Tribunal as to the guilt or innocence of any Defendant...shall be final and not subject to review.”¹⁹⁸ Article 29, however, allowed convicted defendants a thin ray of hope, by giving the Control Council of Germany the power to “reduce or otherwise alter the sentences, but not increase the severity thereof.”¹⁹⁹ Accordingly, in October 1946, after the convictions and sentences were handed down by the Tribunal, the Council met to review the sentences.²⁰⁰ The experience

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *See id.* § 6(H)(5).

¹⁹² *See* 10 U.S.C. § 860(a) (2000).

¹⁹³ *See* 10 U.S.C. § 860(c)(2). “The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.” *See id.*

¹⁹⁴ *See* 10 U.S.C. § 860(c)(3). The convening authority “...in his sole discretion, may – (A) dismiss any charge or specification by setting aside a finding of guilty thereto; or (B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.” *See id.*

¹⁹⁵ *See* 10 U.S.C. § 866 (2000).

¹⁹⁶ *See* 10 U.S.C. § 867 (2000).

¹⁹⁷ *See* 10 U.S.C. § 942(b). (2000).

¹⁹⁸ Charter of the International Military Tribunal, Art. 26.

¹⁹⁹ *Id.*, Art. 29. The Allied Control Council consisted of the commanders of Germany’s four zones of occupation. *See* TAYLOR, *supra* note 175, at 603.

²⁰⁰ *See id.*

of the British commander, Air Chief Marshall Sir Sholto Douglas, is indicative of the “rubber stamp” function that the Control Council would play.²⁰¹ When Douglas indicated to his government that he intended to proceed in a “judicial” rather than a “political” approach to the review, he was chastised by the British Foreign Office and all but ordered to affirm the sentences without alteration.²⁰² Ultimately, the Control Council denied all petitions for leniency.²⁰³

The lack of appellate review by an independent court is the aspect of Military Commission Order No. 1 most subject to legal criticism. As it stands, an individual who is convicted by a Commission composed of members that could be hand-selected by the Secretary of Defense in his role as Appointing Authority,²⁰⁴ has appellate recourse only through a Review Panel, also personally designated by the Secretary of Defense.²⁰⁵ This feature of Commission procedure has been roundly criticized in the press by legal observers and is one provision that may merit reconsideration.²⁰⁶

In its current form, the Commission appellate process varies significantly from that of the court-martial system. While it is true the convening authority of a court-martial details the court members,²⁰⁷ he or she has no influence over the composition of any one of the four Courts of Criminal Appeals²⁰⁸ or the Court of Appeals of the Armed Forces (C.A.A.F.).²⁰⁹ Conversely, there is no check in place to prevent Military Commissions’ Review Panels to become twenty-first century replicas of the Military Control Council, which upheld the sentences imposed at Nuremberg as a matter of national policy.²¹⁰ Indeed, even if the members of the Review Panel took their jobs to scour the record of trial for the existence of material error seriously, pressures similar to that brought against Air Chief Marshall Sir Douglas in 1946 could potentially be exercised against them.²¹¹

²⁰¹ See *id.* at 603-07.

²⁰² See *id.* at 604-06.

²⁰³ See *id.* at 606-07.

²⁰⁴ See Military Commission Order No. 1 § 2, 4(A)(1).

²⁰⁵ Military Commission Order No. 1 § 6(H)(4).

²⁰⁶ See, e.g., Sally Buzbee, *Rumsfeld: Tribunal Rules Protect US*, ASSOCIATED PRESS, Mar. 21, 2002, available at http://story.news.yahoo.com/news?templ=story&u=/ap/20020322/ap_on_go_ca_st_pe; Toni Loci, *Pentagon Issues Tribunal Rule*, USA TODAY, Mar. 22, 2002, available at http://story.news.yahoo.com/news?templ=story&u=/usatoday/20020322/ts_usatoday/3063008; Sue Fleming, *Legal Experts Question Military Tribunals*, REUTERS, Mar. 22, 2002, available at http://story.news.yahoo.com/news?templ=story&u=/nm/20020322/pl_nm/attack/tribunals_dc_13.

²⁰⁷ See R.C.M. 503(a).

²⁰⁸ See 10 U.S.C. § 866(a).

²⁰⁹ See 10 U.S.C. § 942(b).

²¹⁰ See TAYLOR, *supra* note 175, 603-07.

²¹¹ See *id.*

These concerns would be resolved by conferring appellate jurisdiction over Commissions upon the Court of Appeals for the Armed Forces.²¹² C.A.A.F.'s sole subject matter jurisdiction is military law.²¹³ Unlike the members of a Commission Review Panel, however, all of the members of C.A.A.F. are civilians and judges.²¹⁴ Each has been appointed by the President with the advice and consent of the Senate.²¹⁵ Though they do not enjoy the lifetime tenure of Article III judges,²¹⁶ the judges of C.A.A.F. are well insulated from political pressure by fifteen-year terms.²¹⁷ Additionally, not more than three of the five judges may be appointed from the same political party.²¹⁸ Thus, while C.A.A.F. is thoroughly familiar with the workings of the military, its judges could provide appellate review of Commissions without the specter of improper political influence. Though 10 U.S.C. § 867 would have to be amended to extend such jurisdiction,²¹⁹ the benefits to the fairness of the process would be immeasurable.

IV. Conclusion

In presenting the rules of military commissions to the nation, Defense Secretary Rumsfeld stated the procedure "is balanced...is fair...[and] is designed to produce just outcomes."²²⁰ He added it "will speak volumes about our character as a nation."²²¹ The military commissions established by the President's Military Order of November 13, 2001 are clearly an appropriate and lawful response to a grave national dilemma. Moreover, the procedures promulgated by the Secretary of Defense are substantially fair and ensure that the commissions will be instruments of justice, rather than tools of revenge.

²¹² Although this recommendation was derived independently, it has been echoed by at least one other commentator. See Eugene Fidell, (quoted in Sue Fleming, *Legal Experts Question Military Tribunals*, REUTERS, Mar. 22, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/nm/20020322/pl_nm/attack/tribunals_dc_13).

²¹³ See 10 U.S.C. § 867.

²¹⁴ See 10 U.S.C. § 942. Moreover, a person who has retired from the armed forces after 20 or more years of service cannot be considered a civilian for the purpose of appointment to the court. See *id.*

²¹⁵ See *id.*

²¹⁶ See U.S. CONST. art. III, § 1.

²¹⁷ See 10 U.S.C. § 942.

²¹⁸ See *id.*

²¹⁹ See 10 U.S.C. 867.

²²⁰ See Sally Buzbee, *Tribunal Rules Protect US*, ASSOCIATED PRESS, March 21, 2002, available at http://story.news.yahoo.com/news?tmpl=story&u=/ap/20020322/ap_on_go_ca_st_pe/military_tribunals_2.

²²¹ See *id.*

THE DOMESTIC IMPLICATIONS OF ENVIRONMENTAL STEWARDSHIP AT OVERSEAS INSTALLATIONS: A LOOK AT DOMESTIC QUESTIONS RAISED BY THE UNITED STATES' OVERSEAS ENVIRONMENTAL POLICIES

Lieutenant James E. Landis, JAGC, USN

"The primary job of the military departments is to train and equip their personnel to perform warfighting, peacekeeping and humanitarian/disaster assistance tasks."¹

- U.S. Department of Defense

"EPA's mission is to protect human health and to safeguard the natural environment— air, water, and land — upon which life depends."²

- U.S. Environmental Protection Agency

"You can't always get what you want, but if you try sometime, well, you just might find, you get what you need."³

-Mick Jagger

I. Introduction

At first glance, the presumed mission of the Department of Defense (DoD) would seem to run exactly contradictory to the mission of the Environmental Protection Agency (EPA). On one hand, the DoD wages war and inevitably causes damage to human life and the environment. A closer look, however, reveals that the bottom line for the DoD is the *protection* of human life

¹ United States Department of Defense Internet website *What Our Services Do* at <http://www.dod.mil/pubs/dod101/military.html> (last visited April 22, 2002). See also United States Department of Defense Internet website *DoD 101* at http://www.dod.mil/pubs/dod101/dod101_for_2002.html (last visited February 5, 2003) ("The primary job of the military departments is to train and equip their personnel to perform warfighting, peacekeeping and humanitarian/disaster assistance tasks.")

² United States Environmental Protection Agency Internet website *Our Mission* at <http://www.epa.gov/epahome/aboutepa.htm> (last visited February 5, 2003).

³ Mick Jagger and Keith Richards, *You Can't Always Get What You Want* on LET IT BLEED (1969).

and property.⁴ It can be said that as the primary keepers of the environmental laws of our nation, the EPA has a similar role, but with a narrower scope, a clearer focus, and equipped with different methods and means. Each agency appears to be designed to foster and improve the human condition, so the tension between military readiness and environmental protection should be easily solved; that is not the case. Missions of national defense and environmental protection are congruous at times and incongruous at others. From this tension grows a myriad of issues leading to the discovery of anomalies within the law as well as some difficult legal questions. In short, this paper cannot resolve the interplay between those responsible for making the law, those responsible for carrying out the law, and those who must strike political balances between interested parties. This paper will, however, look at some questions raised by the differences between the domestic environmental regulatory scheme and its overseas counterpart.

Domestically and internationally, the DoD is struggling to maintain the proper balance between providing ready military forces and achieving acceptable environmental performance.⁵ Two major environmental issues the military faces at home are funding and encroachment.⁶ Abroad, a major point of discussion is the application for U.S. environmental laws, which is convoluted at best. This paper will discuss the overseas regulatory scheme and what that scheme shows about the domestic environmental scheme. In particular, this paper will provide background on domestic environmental laws and their application, and then analyze how the current overseas scheme has developed, its adequacy, and in the end, why the overseas scheme is unlikely to change.

To understand the national position on overseas environmental protection, it is important to understand and develop the concepts of environmental security and environmental diplomacy. Environmental security has two definitions. The first applies to the independent sovereignty of the several nations. In this context, environmental security measures a nation's confidence in

⁴ United States Department of Defense internet website *Our Bottom Line* at <http://www.dod.mil/pubs/dod101/whatwedo.html> (last visited April 22, 2002) specifically cites "saving lives and protecting property" as military roles and explains its primary mission as "provid[ing] the military forces needed to *deter* war and to protect the security of the United States" (emphasis added). Exact and other similar statements are now found at *DoD 101*, *supra* note 1 (citing as purposes "... saving lives, protecting property [and] keeping the peace...").

⁵ See 147 CONG. REC. H 5393 (daily ed. Sept. 5, 2001) (pertinent section is excerpted as Appendix I).

⁶ See generally, *Constraints and Challenges Facing Military Test and Training Ranges Before the House Armed Services Comm., Subcomm. on Military Readiness*, 107th Cong. (May 22, 2001) (statements of Chairman Curt Weldon, Acting Under Secretary of Defense Joseph J. Angelo, Maj. Gen. Robert L. Van Antwerp, Vice Adm. James F. Amerault, Maj. Gen. Walter E. Buchanan III, and Maj. Gen. Edward Hanlon, Jr.) available at <http://www.house.gov/hasc/schedules/2001.html> (last visited February 5, 2003), and *Environmental and Encroachment Issues Before the House Armed Services Comm., Subcomm. on Military Readiness*, 107th Cong. (March 14, 2002) (statements of Chairman Joel Hefley et. al.) available at <http://www.house.gov/hasc/schedules/2002.html> (last visited February 5, 2003).

continued use of its own natural resources.⁷ In other words, each governing body has both an inalienable right and a duty to determine the proper uses of the resources within its domain.⁸ In this view, the environment is both a source of sovereign power as it arises from the claimed land as well as a beneficiary of sovereign power.

The second definition of environmental security specifically addresses the United States' ability to access overseas bases by showing continued stewardship of the sovereign host nation's natural resources.⁹ This definition contemplates proper environmental management as a bargaining chip in continued use of overseas bases. The definition was solidified in a Department of Defense Directive (DoDD) entitled "Environmental Security" released February 24, 1996.¹⁰ Interestingly, the adopted DoD definition of environmental security discusses the *effects* of the program, without mentioning the *purpose*.¹¹ This definition of environmental security looks exclusively at the diplomatic purpose of United States' overseas environmental regulation. By creating standards or discussing policy, it remains unusually vague, referring to compliance without reasoning, and avoids discussion of the interests at stake.¹²

The very narrow applicability of the second definition of environmental security leads to the concept of environmental diplomacy. In essence, the DoD definition of environmental security is the concept of environmental diplomacy as applied to the interests of the United States. Environmental diplomacy contemplates adherence by one country to the environmental standards or policies of another country as a means to promote international goodwill.¹³ By acting in an environmentally responsible manner, U.S. forces abroad improve international relations and consequently improve the image of the United States abroad, thereby increasing the likelihood that other annoyances from overseas bases will continue to be tolerated.

⁷ Bernard A. Weintraub, *Environmental Security, Environmental Management, and Environmental Justice*, 12 PACE ENVTL. L. REV. 533, 546 (Spring 1995). On whole, Weintraub's article provides justification for considering environmental quality to be a right vested in all mankind. Weintraub's vision of "environmental security" envisions it as among the most important of basic human civil rights.

⁸ See *id.* at 540.

⁹ Lieutenant Colonel Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 49 (1996) (attributing this meaning of the phrase to Gary Vest, Principal Assistant Deputy Under Secretary of Defense, in an address by Mr. Vest entitled "Environmental Security," to Joint Environmental Conference, Washington, D.C. (Sept. 27, 1994)).

¹⁰ DoD Directive 4715.1, Environmental Security (Feb. 24, 1996).

¹¹ *Id.* § E2.1.2 at 10.

¹² *Id.*

¹³ Commander Margaret M. Carlson, *Environmental Diplomacy: Analyzing Why the U.S. Navy Still Falls Short Overseas*, 47 NAVLR 62, 65-66 (2000). (arguing that overseas bases should follow domestic environmental laws. This argument is challenged *infra*, Section VII.)

It should be noted that these definitions have evolved over the last ten years. The pinnacle of these definitions being the concept of environmental diplomacy. Where the DoD definition of environmental security focuses on the “do’s and don’ts” of compliance, environmental diplomacy takes a much broader view of compliance and international relations.¹⁴ Environmental diplomacy is the policy of satisfying compliance demands to the extent necessary for other nations to feel environmentally secure.

In general, the DoD adheres to the standards of all U.S. environmental laws both domestically and internationally. Direct application, however, has proven to be problematic. On the one hand, several of these statutes address economic factors while none specifically address the balancing of military needs.¹⁵ At the same time, none are free from exceptions for national security. These exceptions, however, have been invoked very few times, bringing some amount of question from federal legislators.¹⁶ Here, the concept of environmental diplomacy is turned inward and must be applied domestically, instead of internationally. When applied domestically, environmental diplomacy becomes the more familiar idea of national politics. Since a major concept of this paper concerns how international environmental questions can lead to insights into domestic environmental law, our most important question can be raised here for the first time - how much and in what ways may Congress hamper the President’s capacity to prepare for and wage war?

II. Domestic Environmental Law

¹⁴ For example, compliance with U.S. laws would require more stringent controls than are standard in many host countries. International diplomacy demands that U.S. bases do not demand water and air quality that can not be provided by the host country.

¹⁵ “This failure to consider unique military activities has imposed significant burdens In contrast, provisions in some environmental statutes do require consideration of effects on commercial activities, or the economy generally.” *Environmental and Encroachment Issues Before the House Armed Services Comm., Subcomm. on Military Readiness*, 107th Cong. (March 14, 2002) (statement of Deputy Under Secretary of Defense (Installations and Environment) Raymond F. Dubois, Jr.) available at <http://www.house.gov/hasc/schedules/2002/02-03-14dubois.htm> (last visited April 24, 2002).

¹⁶ PRESS RELEASE, HOUSE ARMED SERVICES COMMITTEE, Mar. 14, 2002, 107th Cong., Opening Statement of Chairman Joel Hefley Subcommittee on Military Readiness at <http://www.house.gov/hasc/pressreleases/2002/02-03-14hefley.html> (last visited on February 5, 2003). In opening the second round of hearings in less than a year on domestic encroachment issues, Chairman Hefley was clear in stating, “we would like for the Department to explain why it has never exercised the exemption authorities that already exist in current law.” Chairman Hefley was referring specifically to the Secretary of Defense’s exemption power within the Endangered Species Act for reasons of national security (16 U.S.C. § 1536(j) (2003)) as well as a measure within 10 U.S.C § 2014 (2003) which allows a five day moratorium pending Presidential action to prevent other agency actions which would have “significant adverse effect on the military readiness of any of the armed forces.”

For the purposes of this paper, there are six important statutory schemes. They are the National Environmental Policy Act,¹⁷ the Endangered Species Act,¹⁸ the Clean Air Act,¹⁹ the Federal Water Pollution Prevention and Control Act (Clean Water Act),²⁰ the Solid Waste Disposal Act (Resource Conservation and Recovery Act),²¹ and the Comprehensive Environmental Response, Compensation and Liability Act.²²

The National Environmental Policy Act (NEPA) was passed in 1969. NEPA provides a procedural framework to ensure that federal agencies identify, analyze and consider the environmental impact of “major Federal actions significantly affecting the quality of the human environment.”²³ While NEPA implements only procedural requirements, parts of the procedure can be daunting in both time and scope. In particular, besides the public comment period required by the Administrative Procedure Act²⁴ and certain implementing regulations,²⁵ NEPA requires that the DoD “shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”²⁶ The act also creates the Council on Environmental Quality²⁷ (CEQ) which supports the President, provides guidance and interpretation for NEPA, and is specifically authorized to grant emergency exceptions to NEPA compliance.²⁸ Notably, NEPA applies to actions taken by *agencies*, and not to actions taken by the President,²⁹ avoiding some potential constitutional issues.³⁰

The Endangered Species Act (ESA) was passed in 1973. The ESA provides a means by which to conserve, protect, and revitalize animal and plant species that are threatened by or in danger of extinction.³¹ Species are differentiated at the subspecies level with respect to “distinct population segment[s].”³² Protection is afforded to individuals of identified species³³ and

¹⁷ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (2003).

¹⁸ Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2003).

¹⁹ Clean Air Act, 42 U.S.C. §§ 7401-7671 (2003).

²⁰ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2003).

²¹ Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (2003).

²² Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2003).

²³ 42 U.S.C. § 4332(C).

²⁴ Administrative Procedure Act, 5 U.S.C. §§ 500-596 (2003).

²⁵ Council on Environmental Quality, 40 C.F.R. § 1503.1 and § 1506.6 (2003).

²⁶ 42 U.S.C. § 4332(C).

²⁷ 42 U.S.C. §§ 4341-4347, § 4342.

²⁸ 40 C.F.R. § 1506.11.

²⁹ 40 C.F.R. § 1508.12.

³⁰ See *infra* note 91, and accompanying text.

³¹ See 16 U.S.C. § 1531(b) and (c).

³² 16 U.S.C. § 1532(16).

³³ 16 U.S.C. § 1538.

includes protection from “harassment”³⁴ and has subsequently been interpreted to provide protection from any adverse habitat modification.³⁵ A clause in the ESA authorizes the Secretary of Defense to exempt any agency action if the exemption is necessary for reasons of national security.³⁶ Additionally, the ESA has been amended to provide an Endangered Species Committee (known informally as the God Squad because of the discretion it wields in potentially determining the fate of entire species), which has the authority to exempt any Federal agency from normal compliance procedures prior to taking an endangered species in limited situations amounting to necessity, but less than emergency.³⁷ Such exemption decisions by the God Squad are not required to use the processes of NEPA, providing that an environmental impact statement has already been completed.³⁸

The Clean Air Act (CAA), was initially passed in 1955, and extensively reworked in 1977. The purpose of the CAA is to ensure that ambient air quality is maintained at a level of purity that will protect public health.³⁹ The general scheme of the act breaks down areas of the country into air quality control regions⁴⁰ which are then measured and compared to national primary ambient air quality standards⁴¹ for different air pollutants. States are granted the authority to develop and implement aggressive programs to control air pollutant emissions in their regions.⁴² The President is expressly granted the authority to exempt any new pollutant emitters “if he determines it to be in the paramount interest of the United States to do so.”⁴³ This may extend to military weaponry, equipment, aircraft, and other classes of military hardware. Another section expressly waives CAA inspection and maintenance requirements for “military tactical vehicles.”⁴⁴ The DoD is specifically granted an exemption from motor vehicle controls where the Secretary of Defense certifies “that an exemption is needed based on national security considerations.”⁴⁵

³⁴ 16 U.S.C. § 1532(19).

³⁵ The definition of “take” for purposes of the statute includes “harm” which includes any “act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” Also considered a “take” is “harass.” This broadens “significant impairment” of behaviors to “significantly disrupt.” United States Fish and Wildlife Service, Definitions, 50 C.F.R. § 17.3 (2003). *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995) upheld this long-standing interpretation.

³⁶ 16 U.S.C. § 1536(j).

³⁷ 16 U.S.C. § 1536(e)-(i).

³⁸ 16 U.S.C. § 1536(k).

³⁹ See 42 U.S.C. §§ 7401 and 7409.

⁴⁰ 42 U.S.C. § 7407.

⁴¹ 42 U.S.C. § 7409(b).

⁴² See 42 U.S.C. § 7410.

⁴³ 42 U.S.C. § 7418(b).

⁴⁴ 42 U.S.C. § 7418(c).

⁴⁵ 42 U.S.C. § 7588(e).

The Federal Water Pollution Prevention and Control Act, known commonly as the Clean Water Act (CWA) was originally passed in 1948 and was extensively modified and revised in 1971. The purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁴⁶ The general scheme divides pollutants into conventional, non-conventional/non-toxic and toxic groups,⁴⁷ and requires compliance with a state-run permitting program.⁴⁸ States are granted the authority to implement stringent controls on the methods used to reduce discharges.⁴⁹ Federal facilities are subject to the CWA unless exempted by the President “if he determines it to be in the paramount interest of the United States.”⁵⁰ The same section allows the President to issue regulations exempting weapons, equipment and classes or categories of property. The CWA also contains a lengthy section creating a national standard to be applied to discharges from vessels of the armed forces.⁵¹ Of importance, the Secretary of Defense may waive compliance if he “finds that compliance with this subsection would not be in the national security interests of the United States.”⁵²

The Solid Waste Disposal Act was originally enacted in 1965, but is more commonly known after complete revision in 1976 as the Resource Conservation and Recovery Act (RCRA). RCRA is designed to promote and protect human health by regulating hazardous wastes and to conserve material and energy resources.⁵³ In essence, RCRA creates what has become known commonly as a cradle-to-grave hazardous waste handling and tracking system.⁵⁴ States are given the authority to manage and enforce the programs at the state level.⁵⁵ In RCRA, Congress “expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement.”⁵⁶ The same paragraph, however, allows the President to exempt executive branch facilities where it is in the paramount interests of the United States. A separate section further emphasizes Federal compliance where underground storage tanks are concerned and again includes a provision for Presidential exemption.⁵⁷

⁴⁶ 33 U.S.C. § 1251(a).

⁴⁷ 33 U.S.C. § 1311(b)(2)(C), (D), (E) and (F).

⁴⁸ 33 U.S.C. § 1313(a).

⁴⁹ 33 U.S.C. §§ 1311(b)(1) and (2) and 1314(b)(1), (2) and (3).

⁵⁰ 33 U.S.C. § 1323(a).

⁵¹ 33 U.S.C. § 1322(n).

⁵² 33 U.S.C. § 1322(n)(1). *See also* 33 U.S.C. § 1322(d) (clarifying the issuance of a national standard for military vessels).

⁵³ 42 U.S.C. § 6902.

⁵⁴ *See* 42 U.S.C §§ 6922-6925.

⁵⁵ 42 U.S.C. § 6926. *See also* 42 U.S.C. § 6964 (further illustrating the compliance expected from executive agencies).

⁵⁶ 42 U.S.C. § 6961.

⁵⁷ 42 U.S.C. § 6991f

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), known better as the Superfund, was passed in 1980. The act has two major parts. The first authorizes certain emergency responses to hazardous material spills.⁵⁸ The second part authorizes long term corrective measures for contaminated sites.⁵⁹ The actions which can be taken in clean-up are broad and provide enormous discretion to the President who is in turn authorized to delegate his duties and powers.⁶⁰ The liability scheme is both strict and retroactive covering almost anyone involved with releases of hazardous materials and provides very limited defenses.⁶¹ CERCLA expressly applies to Federal facilities with exemption authority in the President for matters of national security.⁶² Notably, the provision regarding clean-up agreements becomes vitally important to Federal facilities because of the broad discretionary power vested in the President, however, public participation and opportunity for comment are required.⁶³

III. Domestic Application

NEPA is clearly meant to apply to domestic agency actions, including the DoD.⁶⁴ However, case law has created an exception under which NEPA analysis need not be performed if the mere acknowledgement of Federal agency decision-making may jeopardize national security.⁶⁵ The cases have involved whether or not the DoD was even considering placing nuclear weapons in certain locations.⁶⁶ As with most judicially created exceptions to legislation, this exception is narrow.

The ESA also applies directly to domestic Federal agency actions. In what is our first glimpse into what could imply a troublesome encroachment into Presidential powers, “[a]ll other Federal agencies shall, in consultation with and with the assistance of the Secretary [of the EPA], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the

⁵⁸ 42 U.S.C. § 9604.

⁵⁹ 42 U.S.C. § 9605.

⁶⁰ 42 U.S.C. § 9615.

⁶¹ 42 U.S.C. § 9607.

⁶² 42 U.S.C. § 9620. (Presidential waiver section at § 9620(j)).

⁶³ 42 U.S.C. § 9622.

⁶⁴ 42 U.S.C. § 4332(C).

⁶⁵ STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT, 24-26 (1996) (citing in chief *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 145 (1981), *Foundation on Econ. Trends v. Weinberger*, 610 F. Supp. 829, 839-840 (D.D.C. 1985), *Laine v. Weinberger*, 541 F. Supp. 599 (C.D. Calif. 1982), and *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 745 F.2d 414 (2d Cir. 1989). Dycus also refers to his own paper summarizing the topic, Stephen Dycus, *NEPA Secrets*, 2 N.Y.U. ENVTL. L.J. 300 (1993) available via <http://www.nyu.edu/pages/elj/> (last visited February 5, 2003).)

⁶⁶ *Id.*

conservation of endangered species and threatened species.”⁶⁷ The next paragraph further illustrates the legislative intent that not a single penny of Federal funding may be spent on any activity that may harm listed species without an express exemption from the Secretary.⁶⁸ In fact, the Supreme Court has found that the history of the “endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”⁶⁹ There is, however, a provision that allows the Secretary of Defense to exempt any agency action if necessary for national security.⁷⁰

Fairly quickly, the Clean Air Act was determined by the district court to apply in whole to defense agencies.⁷¹ In relation to the Clean Air Act, applicability has not been addressed by the Supreme Court, but in 1992, the Supreme Court found that while both the Clean Water Act and RCRA apply procedurally, each lacked an unequivocal waiver of sovereign immunity, prohibiting states from collecting penalties for federal violations.⁷² Congress responded that same year by passing the Federal Facility Compliance Act.⁷³ The Federal Facility Compliance Act specifically allowed application of state and local requirements to federal facilities under RCRA and explicitly waived sovereign immunity from fines and

⁶⁷ 16 U.S.C. § 1536(a)(1). There is an argument that this legislation comprises a broad shifting of the main purposes of every federal agency, including federal agencies whose primary purposes are constitutionally committed to Presidential discretion.

⁶⁸ 16 U.S.C. § 1536(a)(2).

⁶⁹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978). This case is not only a fascinating exposition of environmental law, it is a grand example of the interaction between the three branches of government. Much commentary has been generated on this case alone. In short, construction of the proposed Tellico Dam was enjoined. The newly created “God Squad” (*supra* note 30 and accompanying text) concluded that protection of the endangered snail darter outweighed the benefits of the dam. Later, numerous populations of the snail darter were discovered, and the species was removed from listing. The obvious need for amendments to the ESA that were confidently forecast in Justice Powell’s dissent never materialized. (GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW*, 869-870 (4th ed., Foundation Press, 2001). As it stands, protection of endangered species is every agency’s primary mission, even though the very Congressional debate cited by Chief Justice Burger in the majority opinion conspicuously omits any reference to the Department of Defense, the Department of Energy, or national security. (*Tennessee Valley Authority*, 437 U.S. at 184 (citing 119 CONG. REC. 42913 (1973) (statement of Rep. Dingell)).) Further complicating the issue is the interagency cooperation requirement of 16 U.S.C. § 1536, which effectively precludes bringing to court the question of whether national security interests may be taken into account in granting take permits. There is, however, a provision by which the ‘God Squad’ must “grant an exception for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.” (16 U.S.C. § 1536(j)).

⁷⁰ 16 U.S.C. § 1536(j).

⁷¹ See DYCUS, *supra* note 65, at 160 (citing *inter alia*, *California ex rel. State Air Resources Board v. Department of the Navy*, 431 F.2d 1271 (N.D. Cal. 1977)).

⁷² *Id.* (citing *United States Dep’t of Energy v. Ohio*, 503 U.S. 607 (1992)).

⁷³ *Id.* (citing Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102(a)(3), 106 Stat. 1505).

penalties.⁷⁴ State enforced penalties for CWA and CAA violations against the DoD have not been further addressed by the Supreme Court and are questions ripe for continued litigation,⁷⁵ but also areas in which the DoD has either managed to avoid willful violation or ceded applicability.

As far as CERCLA is concerned, application to defense agencies is relatively straightforward.⁷⁶ As far as emergency response, the President has broad authority in responding to immediate hazardous material threats.⁷⁷ In theory, this allows the President to use the military as a main means for emergency hazardous material response. In practice, the Coast Guard plays a co-chairmanship function for the National Response Team,⁷⁸ and the DoD provides major support for the National Contingency Plan program.⁷⁹ Funding extended clean-ups, however, is a much more complex issue.⁸⁰ What is certain, is that defense agencies have begun to clean up contaminated sites and that the speed of clean up is a measure of congressional funding.⁸¹ Perhaps the most significant indicator of a commitment to clean up domestic bases is the creation of the Defense Environmental Restoration Program directing defense agencies to comply with CERCLA.⁸² The statute also creates the Defense Environmental Restoration Account, which is designed to provide the means for Congress to fund DoD facility restoration.⁸³

⁷⁴ Pub. L. No. 102-386, §§ 102(a)(3) and 103 (§ 102(b) requires that moneys collected be used for state environmental programs).

⁷⁵ For a fairly recent and complete look at Federal immunity from civil penalties under the environmental laws, see Charles L. Green (Lt. Col., USA), *A Guide to Monetary Sanctions for Environmental Violations by Federal Facilities*, 17 PACE ENVTL. L. REV. 45, (Winter, 1999).

⁷⁶ 42 U.S.C. § 9620(a).

⁷⁷ 42 U.S.C. § 9604(a).

⁷⁸ United States Environmental Protection Agency Internet website *National Response System* at <http://www.nyu.edu/pages/elj/> (last visited February 5, 2003).

⁷⁹ *Id.*, *NCP Overview* at <http://www.epa.gov/superfund/programs/er/nrs/nrtroles.htm> (last visited February 5, 2003).

⁸⁰ Of the 1221 sites listed on the National Priority List (NPL) as of April 22, 2002, a large number are operated solely by the DoD or are closely related to defense projects, thereby implicating DoD liability. The NPL can be accessed at <http://www.epa.gov/superfund/sites/query/queryhtml/nplfin1.htm> (last visited February 5, 2003).

⁸¹ The Navy has requested \$239 million for fiscal year 2003 BRAC clean-up. (*FY 2003 National Defense Authorization Budget Request Before the House Armed Services Comm., Subcomm. on Military Installations & Facilities*, 107th Cong. (March 20, 2002) (joint statement from Assistant Secretary of the Navy (Installations and Environment) H.T. Johnson et. al.) available at <http://www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/02-03-20johnson.html> (last visited February 5, 2003). This is only a small portion of the Navy's total clean-up bill. The Department of Energy has estimated that DOE site clean-up will take 70 years and \$220 billion to complete. The request for clean-up related funding for fiscal year 2003 is approximately \$6 billion. (*Hearing on FY 2003 DOE National Security Budget Before the House Armed Services Comm.*, 107th Cong. (March 13, 2002) (statement of DOE Secretary Spencer Abraham) available at <http://www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/02-03-13abraham.html> (last visited February 5, 2003).

⁸² 10 U.S.C. § 2701 (2002) (directing compliance with CERCLA and 42 U.S.C. § 9620).

⁸³ 10 U.S.C. § 2703.

The DoD guidance on domestic environmental restoration is found in Department of Defense Instruction 4715.7.⁸⁴ The Instruction directs only domestic cleanups.⁸⁵ The multitude of paths being used to fund the domestic environmental programs of the defense agencies is beyond the scope of this paper.

IV. Some Arguments for National Defense Exemptions

Military compliance with domestic environmental legislation provides a worthy point upon which to apply some constitutional concepts of the *Steel Seizure Case*.⁸⁶ Generally, environmental legislation is justified by the Commerce Clause.⁸⁷ For Presidential authority in controlling the military and general issues regarding national security, the aggregate of several constitutional sections can be offered.⁸⁸ Whether it was constitutionally intended or merely “constitutional gloss,”⁸⁹ the President’s authority to manage and direct actions clearly involving national security has amassed precedent enough to have become a supportable legal basis.⁹⁰ In practice, the question puts a twist on Justice Jackson’s famous three-category *Steel Seizure* concurrence. Instead of two branches struggling over conflicting constitutional provisions in regards to controlling warfighting, environmental laws pit the constitutional grant of the Commerce Clause against the collected constitutional powers of the President. Within which of Jackson’s categories would this conflict be viewed?

The proliferation of Presidential and other exemptions within the environmental laws⁹¹ further complicates the analysis. The inclusion of such

⁸⁴ Department of Defense Instruction 4715.7, Environmental Restoration Program (Apr. 22, 1996).

⁸⁵ DoDI 4715.7 § 2.2 at 2.

⁸⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the *Steel Seizure Case*). It is Justice Jackson’s concurring opinion that provides the framework for the discussion of the separation of war powers as established by the Constitution. Justice Jackson’s analyzes the three scenarios where Presidential war powers and Congressional war powers may interact: 1) when the President acts with the express agreement of Congress, 2) when the President acts and Congress remains silent, and 3) when the President acts against the interests of Congress. The category of conflict determines whether the action has maximum constitutional support by combining presidential and congressional authority, independent support by the President alone, or minimum legal support by subtracting Congress’s authority from the President’s authority. *Steel Seizure Case*, 635-638.

⁸⁷ U.S. CONST. art. I, § 8, cl. 2. See generally *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (U.S. App. D.C. 1997).

⁸⁸ U.S. CONST. art. II, §§ 1 and 2. Cf. the *Steel Seizure Case*.

⁸⁹ STEPHEN DYCUS ET AL., *NATIONAL SECURITY LAW*, 49-54 (1997). While DYCUS ET AL. does not declare any particular constitutional provision of Presidential authority controlling, the text clearly supports the proposition of authority by estoppel.

⁹⁰ But see DYCUS, *supra* note 65 at 9. In his individually written book, Dycus comments that presidential authority to act in wartime has been *diminishing* for over two centuries.

⁹¹ See *id.* at 42. Dycus does not consider NEPA to contain waiver authority even when in the paramount interest of the United States. But compare with Council on Environmental Quality, 40 C.F.R. § 1507.1 which excludes presidential actions. For the discussion above, consider that

exemption provisions tends to avoid altogether the constitutional questions just raised. The conflict between congressional and presidential powers has not been litigated in relation to the impact of environmental laws on military readiness. Notably, the DoD virtually never uses exceptions to the environmental laws.⁹² The question becomes whether the President has a constitutional grant of authority to maintain the readiness of warfighting forces that overcomes congressional mandates under the Commerce Clause. As a final complication before moving to firmer ground, only very recently has the military begun to correlate environmental compliance with an impact on force readiness,⁹³ although there has long been a documented effect on costs - in dollars, time and difficulty.⁹⁴ At some point, congressional legislation that hampers the President's capacity to execute the laws, protect and defend the Constitution, and carry out the duties of Commander in Chief, becomes unconstitutional. If the scope is further narrowed, the issue becomes to what point may environmental compliance interrupt military training?⁹⁵

Notwithstanding the incorrect thrust of this question, the Supreme Court has provided a questionable precedent. *Tennessee Valley Authority* declared that Congress intended to commandeer all agency missions in protecting endangered species.⁹⁶ The dissent pointed out the potential effects on national defense, yet Congress did not act. Failure to act does not generally imply intent, but here, the failure to act was a failure to respond to a legal decision regarding congressional intent. This would buttress the argument that Congress did, in fact, intend to make the protection of endangered species the primary mission of the DoD. In application, this failure to act indicates an intention to create legislation questionably beyond the scope of constitutional authority. Regardless of the training versus compliance question, the question that *Tennessee Valley Authority* poses is whether Congress may absolutely dictate the primary missions of national defense agencies. Certainly there are relevant differences between agencies that build dams and those responsible for training the military.⁹⁷ The Constitution was

presidential direction of any action is exempted from NEPA, creating a much more broad exemption than merely for national security in the paramount interests of the United States.

⁹² *Id.*

⁹³ *Environmental and Encroachment Issues Before the House Armed Services Comm., Subcomm. on Military Readiness*, 107th Cong. (March 14, 2002) (statement of Deputy Undersecretary of Defense Dr. Paul W. Mayberry) available at <http://www.house.gov/hasc/pressreleases/2002/02-03-14mayberry.html> (last visited April 24, 2002).

⁹⁴ See *supra* note 6 and accompanying text.

⁹⁵ Notably, Congress has already precluded this problem (see *supra* note 91). In reality, this is precisely the topic being discussed in the HASC hearings, *supra* note 6. In fairness, and in light of the rest of the paper, the question has been unfairly posed, because the answer rests within the DoD itself, with the DoD being either unwilling, unable, or unduly internally restrained from making the independent decision regarding when national security has begun to be jeopardized.

⁹⁶ See *supra* note 69.

⁹⁷ I believe that Congress has already recognized relevant differences within the original enactment of the Endangered Species Act which provided exemption authority for defense activities. *Tennessee*

not created to allow Congress to rely on the Commerce Clause to restrict the President's ability to prepare to defend the nation.

Moving beyond the borders of U.S. territory sheds light on the President's powers and further complicates the constitutional power struggle. The President's extensive foreign relations powers are supported by both the Constitution⁹⁸ and Supreme Court precedent.⁹⁹ Besides presenting issues of the extraterritorial application of congressional legislation,¹⁰⁰ overseas application of environmental laws that restrict the President's authority to set foreign policy would bolster the argument that such laws are unconstitutional in application.

Domestically, the basic argument against application of environmental laws to defense establishments is the argument of sovereign immunity. While most of the statutes grant a private right of action against federal facilities,¹⁰¹ few express a waiver of sovereign immunity with the clarity necessary to allow the collection of penalties against federal agencies.¹⁰² An exception to the general rule that private rights of action can be brought under the environmental laws exists with any regulation that is made effective only by executive order.¹⁰³ A related issue of sovereignty and international diplomacy¹⁰⁴ arises under the context of extraterritorial application of United States' statutes.¹⁰⁵ In short (and notwithstanding certain agreements to the contrary), sovereign nations have the exclusive right to determine the law within their country.

Valley Authority should never have made the mistake of grouping all agencies together against the plain meaning of the legislation at issue. Congressional intent was to *support* the primary mission of the DoD, not override it. In *Tennessee Valley Authority* the Court relies on a change from a previous version of the Endangered Species Act which omitted the language "insofar as is practicable and consistent with [their] primary missions" (*Tennessee Valley Authority* at 181, quoting the Endangered Species Act of 1966 (repealed)) to show Congressional intent to override the primary missions of *all* agencies. This interpretation of intent completely ignores that the 1973 revision included an entire section providing exemption authority for the DoD. It can (and should) be argued from the plain meaning of the statute that Congress intended to *include* considerations of national defense in deciding actions to be taken to protect threatened species. Furthermore, where an act includes a section allowing complete exemption for certain activities, it is completely reasonable to include similar factors in the determination of individual examples.

⁹⁸ U.S. CONST. art. II, § 2.

⁹⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹⁰⁰ See *infra*, Section V.

¹⁰¹ See *DYCUS*, *supra* note 65 at 161.

¹⁰² See *id.* at 160.

¹⁰³ See *infra*, note 134 and accompanying text. Executive Orders do not ordinarily create any rights of action. Additionally, the Executive Orders discussed in relation to implementing the environmental laws contain explicit restrictions on private rights of action.

¹⁰⁴ See generally, Carlson, *supra* note 13. In particular, Carlson's section on "Governing Environmental Standards for Overseas Installations" at 92, which emphasizes the political nature of rulemaking and enforcement.

¹⁰⁵ See discussion *infra*, Section V. See also, discussion on environmental diplomacy *supra*, Section I.

Another strong argument concerning environmental law application raises the political question doctrine. To begin, the monetary figures being spent by defense agencies on environmental compliance appears to be staggering¹⁰⁶ yet Congress continues to take actions to limit the amount the DoD is allowed to or capable of spending on environmental issues.¹⁰⁷ Environmental problems are not often rectified simply or inexpensively, and the purse string is constitutionally committed to control by Congress. Secondly, courts have traditionally allowed the national defense agencies considerable deference.¹⁰⁸ A judge may feel that the question is not hers to decide,¹⁰⁹ may feel that she lacks the “training and experience in national security matters that military and intelligence professionals bring to their work,”¹¹⁰ or acknowledge that a great deal of national security planning requires a great deal of speculation. Further, there is a multitude of mechanisms available for exemptions or change clearly indicating policy decisions being committed to the appropriate branches of government. In all, the political question doctrine provides several strong reasons for the court to decline review.¹¹¹ On the other hand, advocating the political question doctrine is akin to kicking dirt at the umpire. Even when done with great skill and finesse, it raises questions of authority and strikes at the heart of the three-branch, checks-and-balances system. The argument may easily backfire. Both DoD attempts at using the political question doctrine to remove issues from the legal system have failed.¹¹²

Finally, there is the Unitary Executive Principle. The unitary executive theory espouses the idea that all activities working in the executive branch are agents of the President. As agents, they must contribute to the role of the President who is bound to “take care that the Laws be faithfully executed.”¹¹³ Also, as a practical matter, for the Justice Department to bring suit against another

¹⁰⁶ “From FY 1991 to FY 2001, the Department of Defense invested over \$48 Billion dollars [sic] on its Environmental Programs.” *Environmental and Encroachment Issues Before the House Armed Services Comm., Subcomm. on Military Readiness*, 107th Cong. (March 14, 2002) (statement of Deputy Under Secretary of Defense (Installations and Environment) Raymond F. Dubois, Jr.) *available at* <http://www.house.gov/hasc/schedules/2002/02-03-14dubois.htm> (last visited April 24, 2002).

¹⁰⁷ See Carlson, *supra* note 13 at 100-101 (citing at least three budget constraints and resulting adjustments). Also, at 101: “DoD installations differ fiscally from private industry. Private industry earns its own money and makes its own decisions as to how to spend that money. DoD ... funding is totally controlled by Congress. Similarly, Congress specifies how that money must be spent.”

¹⁰⁸ See DYCUS, *supra* note 65 at 154-155. “[S]ubstantive decisions relating to the national defense and national security lie within that narrow band of matters wholly committed to official discretion.” ... The judicial constraint described here is both constitutional and prudential.” (DYCUS at 154.)

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing also a position analogous to the contrary in *United States v. United States District Court*, 407 U.S. 297, 320 (1972).)

¹¹¹ The standard language for triggering unreviewability under the political question doctrine are found in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹¹² DYCUS, *supra* note 65 at 165 (citing *Romer v. Carlucci*, 847 F.2d 445 (8th Cir. 1988) and *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380 (9th Cir. 1988).)

¹¹³ U.S. CONST. art. II, § 3.

agency (or for the EPA to administer legally binding orders on other agencies) would be like suing oneself.¹¹⁴ Such a theory and distinctions are in many ways purely academic. Combined with certain cooperation and preclusion clauses in several of the environmental statutes,¹¹⁵ however, the effect has been to keep most inter-agency problems within the executive branch. While internal cooperation may both improve decision-making and limit exposure, it also may prevent the courts from settling some genuine issues of interpretation.¹¹⁶

V. General Extraterritorial Applicability of U.S. Statutes¹¹⁷

Congressional legislation is presumed to apply only to territories under the direct control of the United States, unless a contrary intent is otherwise shown.¹¹⁸ Language merely implying broad jurisdictional scope is not enough.¹¹⁹ The first test for extraterritorial applicability for the environmental statutes came in 1993. In *Environmental Defense Fund v. Massey*, concerning the application of NEPA planning for an incinerator in Antarctica, the District of Columbia Court of Appeals outlined three existing categories of cases for which the presumption against the extraterritorial application of statutes does not apply.¹²⁰ Additionally, the *Massey* court addressed the underlying reasons for limiting application in justifying the creation of a fourth exemption.

“First, as made explicit in [*Arabian American Oil*], the presumption will not apply where there is an ‘affirmative intention of the Congress clearly expressed’ to extend the scope of the statute to conduct occurring within other sovereign nations.”¹²¹ The second exception allows extraterritorial application where failure to act would result in unjust, negative and unintended impacts would be felt domestically.¹²² Principally, this exception has been used to extend copyright and anti-trust laws to U.S. companies operating in foreign countries.¹²³

¹¹⁴ DYCUS, *supra* note 65 at 159.

¹¹⁵ For example, see 42 U.S.C. § 9606(a), 33 U.S.C. § 1365(b), and 16 U.S.C. § 1533(f) for CERCLA, CWA, and ESA. Each of these provisions would allow the EPA and the DoD to perform planning functions internally to the executive branch and preclude most, if not all, citizen actions. The CWA maintains a provision for citizens to join suits in progress or sue the EPA Administrator.

¹¹⁶ See *supra* note 69.

¹¹⁷ Portions of the following section are covered by DYCUS, *supra* note 65 at 26-28 and 72-74.

¹¹⁸ Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (citing *cf. Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-285 (1949)). See also Carlson, *supra* note 13 at 70-71 and Phelps, *supra* note 9 at 50.

¹¹⁹ *Id.* at 249-250.

¹²⁰ *Environmental Defense Fund v. Massey*, 985 F.2d 528 (1993).

¹²¹ *Id.*, at 531 (citing *Arabian American Oil*, 499 U.S. at 248 (in turn quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, (1957))).

¹²² *Massey*, 985 F.2d at 531.

¹²³ *Id.*, citing in chief, *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (Lanham Trade-Mark Act applies extraterritorially when defendant is a United States national) and *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945) (applying U.S. antitrust laws extraterritorially).

Third, the presumption can be rebutted “when the conduct regulated by the government occurs within the United States.”¹²⁴ The argument would be that actions outside of the United States are still decided and planned by persons within the United States and clearly within U.S. jurisdiction. While this presents a complex fact-finding issue ripe for litigation, the court continued: “where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.”¹²⁵ This, of course, has immediate impact on planning and permitting types of regulations, but less of an impact on emission and discharge control regulations. On the other hand, such application could be applied to rulemaking actions and regulation decisions as well as department regulations and procedures.¹²⁶ For an example of this difference, imagine a soldier finishing his watch in a foreign land, deciding which wastebasket in which to dispose of his worn out flashlight batteries versus the *policy* decision made by an undersecretary somewhere in the halls of the Pentagon on how to dispose of *all* small batteries.

As far as the newly created exception based on underlying principles, the *Massey* case stands for the proposition that congressional regulation applies to all areas not regulated by a sovereign.¹²⁷ The essential question is whether the regulation “create[s] a potential for ‘clashes between our laws and those of other nations’ if it was applied to the decisionmaking of federal agencies regarding proposed actions.”¹²⁸ The case stated that it was decided on a narrow basis, and a later attempt failed to extend the application of NEPA to foreign lands governed by a sovereign.¹²⁹ The Global Commons exception was born. While Antarctica is a relatively limited geographical area, especially in terms of defense agency actions, the global commons are not. For the DoD, direct applicability of domestic legislation potentially extends to the open seas, international airspace, and outer space.

VI. The Overseas Environmental Regulation Scheme

Current overseas environmental guidance for defense agency installations is based primarily on two Executive Orders and precipitated by one Congressional

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *But cf.*, Carlson, *supra* note 13 at 76. CDR Carlson goes to some extent explaining that DoD rulemaking is exempt from the APA because the rules only apply within the DoD. At no point does she mention that such regulations may still be subject to *other* congressional regulation.

¹²⁷ *Cf.* Carlson, *supra* note 13 at 88.

¹²⁸ *Massey*, 985 F.2d at 532 (quoting *Arabian American Oil*, 499 U.S. at 282.).

¹²⁹ Carlson, *supra* note 13 at 87 (citing *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (1993)). Notably, this was decided by the D.C. District Court which referred to *Massey* as an aberrational result in the same year as *Massey* with the Appeals court denying review.

National Defense Authorization Act. A long string of Executive Orders directed domestic Federal facility compliance with national environmental standards.¹³⁰ On October 13, 1978, President Jimmy Carter took the next step in issuing Executive Order 12088, Federal Compliance with Pollution Control Standards.¹³¹ In short, the order requires compliance with the major environmental statutes of the time.¹³² More remarkably, for the first time, extraterritorial compliance was addressed.¹³³ In particular, Executive Order 12088 states that agency heads operating facilities outside the U.S. “shall ensure that such construction or operation complies with the environmental pollution control standards of general applicability in the host country or jurisdiction.”¹³⁴ The language limiting compliance to generally applied host country laws is an apparent attempt to guard against two distinct, but equal evils. Agency heads do not need to comply with any environmental laws created to unfairly or prejudicially single out defense facilities, nor would compliance be necessary where environmental laws are not generally enforced or disregarded. Furthermore, the order expressly denies any rights or benefits “enforceable at law by a party against the United States, its agencies, its officers, or any person.”¹³⁵ This not only conforms to general Executive Order usage, it has been an enduring standard.

The next big step came less than four months later, on January 4, 1979, when President Carter issued Executive Order 12114.¹³⁶ Environmental Effects Abroad of Major Federal Actions provided that “[e]very Federal agency taking major Federal actions ... having significant effects on the environment outside the geographical borders of the United States” shall implement an informed planning process very similar to NEPA, even requiring consultation with the Council on Environmental Quality.¹³⁷ In short, NEPA was extended by direction to facilities and operations outside of U.S. territories. The major criticism of the order is that it includes a list of exceptions for the military that differ from NEPA.¹³⁸ In short, most of the military exceptions commentators cite as abhorrent to the intent of NEPA *exist independently* anyway, either in separate parts of NEPA or from case law, and will be discussed further in Section VII. On the other hand, the actions requiring environmental analysis have at least one difference that has escaped

¹³⁰ Phelps, *supra* note 9 at 52.

¹³¹ Exec. Order No. 12088 (Oct. 13, 1978), 3 C.F.R. 243 (1978), *reprinted as amended in* 42 U.S.C. § 4321 nt. (2002).

¹³² *Id.* at § 1-102. Notably included are the CAA, CWA, and RCRA, while notably missing is the ESA.

¹³³ Phelps, *supra* note 9 at 53.

¹³⁴ Exec. Order No. 12088 § 1-801 (Oct. 13, 1978), 3 C.F.R. 243 (1978), *reprinted as amended in* 42 U.S.C. § 4321 nt. (2002).

¹³⁵ *Id.* at § 1-802.

¹³⁶ Exec. Order No. 12114 (Jan. 4, 1979), 3 C.F.R. 356 (1979), *reprinted as amended in* 42 U.S.C. § 4321 nt. (2002).

¹³⁷ Exec. Order No. 12114 § 2-1 (Jan. 4, 1979), 3 C.F.R. 356 (1979), *reprinted as amended in* 42 U.S.C. § 4321 nt. (2002).

¹³⁸ Carlson, *supra* note 13 at 74.

major criticism. Projects in which the host country plays a major role or receives significant benefit may be exempt from analysis.¹³⁹ This may be an area open to further study or comment. Implementation of Executive Order 12114 was accomplished within three months, with the issuance of DoD Directive 6050.7.¹⁴⁰ Notwithstanding the DoD's references to different policies and legal justifications, DoD Directive 6050.7 created a system with little or no difference from domestic NEPA compliance directives and interpretations.¹⁴¹

Defense facilities did not respond nearly as well to Executive Order 12088. A decade passed before Congress reacted to two General Accounting Office studies highlighting overseas environmental compliance problems.¹⁴² In the National Defense Authorization Act of 1991, Congress mandated that the DoD develop a policy to identify and enact appropriate requirements applicable to overseas installations.¹⁴³ History shows that the enactment of DoD Directive 6050.16 executed the clause the following September.¹⁴⁴ The Directive states that "[t]he Department of Defense shall establish a baseline guidance document for the protection of the environment at DoD installations and facilities outside U.S. territory."¹⁴⁵ What this means to compliance is that the Secretary of Defense has authorized and specifically directed the development of an overseas compliance policy.

This directive lead to the creation of the Overseas Environmental Baseline Guidance Document¹⁴⁶ (OEBGD). In 1996, after the OEBGD had been established and implemented, DoDD 6050.16 was replaced by DoD Instruction 4715.5, Management of Environmental Compliance at Overseas Installations.¹⁴⁷

¹³⁹ Exec. Order No. 12114 § 2-4 (Jan. 4, 1979), 3 C.F.R. 356 (1979), *reprinted as amended in* 42 U.S.C. § 4321 nt. (2002).

¹⁴⁰ DoD Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions (Mar. 31, 1979).

¹⁴¹ Compare DoD Directive 6050.7 Purpose at 1 with DoD Directive 6050.1 (Environmental Effects in the United States of DoD Actions (Jul. 30, 1979)), and CEQ 40 C.F.R. § 1500 *et. seq.* (Despite the language emphasizing philosophical differences between the overseas and domestic regimes, the overseas scheme is a very close mirror to the domestic, containing obvious influences from the directed consultation with the CEQ.)

¹⁴² Phelps, *supra* note 9 at 54 (citing GAO/C-NSIAD-86-24, Hazardous Waste Management Problems at DoD Overseas Installations (Sept. 1986); GAO/NSIAD-91-231, Hazardous Waste Management Problems Continue at Overseas Military Bases (Aug. 1991)). See also Carlson, *supra* note 13 at 77.

¹⁴³ National Defense Authorization Act for Fiscal Year 1991, Pub.L. No. 101-510, § 342(b)(1), 104 Stat. 1485, 1537-38 (1990). See Phelps, *supra* note 9 at 54.

¹⁴⁴ DoD Directive 6050.16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations (Sept. 20, 1991). It should be understood that this line of implementation concerns only compliance issues, and expressly does not apply to remediation or cleanup (DoDD 6050.16 § 2.5 at 2). See also, Phelps, *supra* note 9 at 54-55.

¹⁴⁵ DoDD 6050.16 § 3.1 at 2.

¹⁴⁶ See Carlson, *supra* note 13 at 78, and Phelps, *supra* note 9 at 55.

¹⁴⁷ See Carlson, *supra* note 13 at 78 (citing DoD Instruction 4715.5, Management of Environmental Compliance at Overseas Installations (Apr. 22, 1996)).

In essence, these policy mandates require the overseas installations in each foreign country to compare the OEBGD with local environmental standards of general applicability in determining the appropriate standards for U.S. military bases in that country.¹⁴⁸ The ensuing compilation of rules is known as the Final Governing Standard (FGS),¹⁴⁹ and is a unique combination of U.S. and host country law.¹⁵⁰ “[T]he FGS will reconcile the requirements of applicable international agreements, applicable host-nation environmental standards under Executive Order 12088 ... and the Overseas Environmental Baseline Guidance Document.”¹⁵¹ Where inconsistencies arise between U.S. and host-nation law not otherwise resolved by international agreement, the more restrictive standard scheme or regime is to be used.¹⁵² Where the host nation regulates conduct not addressed by U.S. statute, the host nation guidance will control.¹⁵³ The control of hazardous materials receives special attention,¹⁵⁴ probably because the topic is one of international disagreement.¹⁵⁵

The most recent rewrite of the OEBGD was issued in March of 2000.¹⁵⁶ Lest anyone think that little time or effort has gone into compiling and assessing the applicability of U.S. environmental law, the OEBGD is 230 pages long, covering 22 ostensibly military compliance references which in turn incorporate virtually every U.S. environmental regulation. Topics cover air emissions, water purification and quality, hazardous material handling, waste management, several specific classes of material hazards, spill response and planning, protection of cultural resources, and protection of natural resources and endangered species. Coverage appears to adequately address major issues of domestic environmental law. This is not to say that extraterritorial compliance is exactly the same as domestic.

The most significant departure is probably in the section protecting threatened species. Application of the Endangered Species Act (“sometimes

¹⁴⁸ DoDI 4715.5 § 4.1 at 3.

¹⁴⁹ Because FGS’s are country-specific and numerous, further discussion of FGS’s is too narrow to be within the scope of this paper.

¹⁵⁰ See Carlson, *supra* note 13 at 78. See also Phelps, *supra* note 9 at 55.

¹⁵¹ DoDI 4715.5 § 4.1 at 3.

¹⁵² *Id.* §§ 6.3.3.1 and 6.3.3.2.

¹⁵³ *Id.* §§ 6.3.3.3 at 8.

¹⁵⁴ *Id.* §§ 6.4 at 9.

¹⁵⁵ The United States has signed, but not ratified, the Basel Convention which regulates the movement and handling of hazardous materials and wastes. (See also Phelps, *supra* note 9 at 72-73 (citing 1989 Basel Convention on the Control and Transboundary Movements of Hazardous Wastes and Their Disposal, 28 I.L.M. 649 (Mar. 22, 1989) available at <http://www.unep.ch/sbc.html>, and Carlson, *supra* note 13 at 95-96.)

¹⁵⁶ Department of Defense, Overseas Environmental Baseline Guidance Document, DoD 4715.5-G (Mar. 2000). The forward to the OEBGD offers that the document is available online at <http://www.denix.osd.mil>.

called the ‘pit bull’ of environmental statutes”¹⁵⁷) is reduced to a mere 8 pages. Essentially, however, the changes reduce down to 1) consulting locally instead of with the EPA,¹⁵⁸ 2) eliminating the absolute prohibition on “takings” without an EPA permit,¹⁵⁹ and 3) requiring only those actions that are “reasonable” and do not interfere with the missions of the bases.¹⁶⁰ Overall, this seems to make sense, as the EPA will certainly not have jurisdiction, and potentially lacks expertise in foreign countries. Also, the move toward “reasonable” regulation parallels both the untested question of applying *Tennessee Valley Authority* to the national defense agencies¹⁶¹ and the current trend of domestic military objection to increasingly cumbersome environmental regulation.¹⁶²

Probably of most importance to the effective functioning of overseas facilities, DoDI 4715.5 (and therefore the OEBGD and FGS’s) specifically does “not apply to the operations of U.S. military vessels, to the operations of U.S. military aircraft, or to off-installation operational and training deployments.”¹⁶³ These exemptions cover a significant portion of daily operations. Again, this kind of exemption speaks to the unique mission of the Department of Defense, and questions the premise of the holding in *Tennessee Valley Authority* that would make endangered species protection the primary mission of all federal agencies.

What about overseas environmental remediation? Cleanup at overseas installations continues to be even more problematic than domestic cleanup.¹⁶⁴ Notably, each of the funding sources previously mentioned applies only to domestic clean-ups.¹⁶⁵ The overseas scheme is very different. The National Defense Authorization Act for Fiscal Year 1991 that spurred immediate response for overseas compliance, also included a provision that “[t]he Secretary of Defense shall develop a policy for determining the responsibilities of the Department of Defense with respect to cleaning up environmental contamination” at overseas facilities.¹⁶⁶ This language, however, did not parallel the much more direct

¹⁵⁷ COGGINS ET AL., *supra* note 69 at 855.

¹⁵⁸ Compare OEBGD §§ C13.3.3, C13.3.4, and C13.3.7 with 16 U.S.C. § 1536(a).

¹⁵⁹ Compare OEBGD §§ C13.3.1 and C13.3.8 with 16 U.S.C. § 1538(a)(1).

¹⁶⁰ Compare OEBGD §§ C13.3.1, C13.3.4 and C13.3.6 with *Tennessee Valley Authority*, 437 U.S. at 185 (see note 69 and accompanying text for explanation of effects of ESA on primary missions of agencies).

¹⁶¹ For a discussion on why the holding of *Tennessee Valley Authority* may not transcend the primary missions of defense agencies, see *infra* notes 86-97 and accompanying text.

¹⁶² For a discussion on the issues of training, readiness, expenditure and protection of endangered species, see *supra* notes 5 and 6 and accompanying text as well as Appendix I.

¹⁶³ DoDI 4715.5 § 2.1.4 at 2.

¹⁶⁴ See *supra* notes 80 to 85 and accompanying text.

¹⁶⁵ See *supra* notes 80 to 83 and accompanying text.

¹⁶⁶ National Defense Authorization Act for Fiscal Year 1991, Pub.L. No. 101-510, § 342(b)(2) (1990). See also, Carlson, *supra* note 13 at 79 (citing LT. COL. RICHARD A. PHELPS (USAF), ENVIRONMENTAL LAW FOR DEPARTMENT OF DEFENSE INSTALLATIONS OVERSEAS III, 12 (1998)).

instruction requiring the generation of the OEBGD.¹⁶⁷ In particular, identification and enactment of requirements is very different from developing a policy. Additionally, the language requiring development of a cleanup policy also required that considerations of joint use, joint benefit, relative burden, and other negotiations should be considered.¹⁶⁸ Simply, Congress projected less than enthusiastic support for paying bills for overseas cleanups. Notably, no appropriations were made for overseas cleanup. Eventually, over seven years after the authorization bill, the DoD released DoD Instruction 4715.8 to provide policy guidance in conducting overseas cleanups.¹⁶⁹ The Environmental Remediation Policy for DoD Activities Overseas divides cleanup activities into two major parts: continuing facilities and non-continuing facilities.

Non-continuing facilities are those that have either been returned or are scheduled to be returned to the host nation. For such bases, cleanup is limited to performing “prompt action to remedy known imminent and substantial endangerments to human health and safety” caused by DoD environmental contamination.¹⁷⁰ Further, if the base has already been returned, “[s]uch remediation ... shall be limited to the essential elements in a remediation plan.”¹⁷¹ Finally, “[i]nternational agreements may also require the United States to fund environmental remediation.”¹⁷²

Continuing facilities are those that are open and expected to be available for continued use. For such bases, cleanup is again limited to performing “prompt action to remedy known imminent and substantial endangerments to human health and safety” from DoD contaminants.¹⁷³ The in-theater military commander may be authorized to approve additional cleanup programs, however, if “additional remediation measures are required to maintain operations or protect human health and safety.”¹⁷⁴ Perhaps the most crucial paragraph in clarifying the U.S. position on cleanup liability finishes the continuing bases section. It states that remediation “may be undertaken by the host nation using its own resources.... The DoD Components shall encourage such remediation and cooperate with host-nation efforts by providing the information...and appropriate access to contaminated sites, subject to operational and security requirements.”¹⁷⁵

¹⁶⁷ Compare National Defense Authorization Act § 342(b)(1) with National Defense Authorization Act § 342(b)(2). (Compare text accompanying note 143 with text accompanying note 166.)

¹⁶⁸ National Defense Authorization Act § 342(b)(2).

¹⁶⁹ DoD Instruction 4715.8, Environmental Remediation Policy for DoD Activities Overseas (Feb. 2, 1998).

¹⁷⁰ *Id.* § 5.2.1 at 5.

¹⁷¹ *Id.* § 5.2.1.1 at 5.

¹⁷² *Id.* § 5.2.3 at 6.

¹⁷³ *Id.* § 5.1.1 at 4.

¹⁷⁴ *Id.* § 5.1.2 at 4.

¹⁷⁵ *Id.* § 5.1.4 at 4.

Initially, this appears to be a far cry from CERCLA style liability.¹⁷⁶ Upon closer inspection, however, not only does the Instruction further the reasonably inferred intent of Congress,¹⁷⁷ it also follows general CERCLA principles of liability. CERCLA imposes not just strict liability,¹⁷⁸ it presents joint and several liability.¹⁷⁹ When the legislative history of CERCLA¹⁸⁰ and the implementation of the National Defense Authorization Act of FY 1991¹⁸¹ are analyzed, suddenly DoDI 4715.8 makes sense. Based on 1) Congressional intent of the original CERCLA, 2) lack of funding for overseas cleanup, and 3) the direction of the National Defense Authorization Act of FY 1991, the DoD has taken the position that host countries are at least partially liable for environmental remediation. As such, the DoD will seek an equitable share of cleanup costs beyond immediate actions to protect human health.¹⁸² Distribution of costs under any joint and several liability scheme will present problems ripe for litigation. DoDI 4715.8 makes adequate room for negotiation and in fact requires adherence to pre-negotiated agreements.¹⁸³ While some nations have effectively leveraged environmental cleanup clauses into international agreements, other nations have not.¹⁸⁴ The topic is likely to continue to provide fuel for international discord.

¹⁷⁶ See *supra* note 61 and accompanying text.

¹⁷⁷ See *supra* notes 166 to 169 and accompanying text.

¹⁷⁸ See *supra* note 61 (citing 42 U.S.C. § 9607) and accompanying text. See also, Lt. Col. Cheryl Lynch Nilsson (USAF), *Defense Contractor Recovery of Cleanup Costs at Contractor Owned and Operated Facilities*, 38 AFLR 1, 3 (1994). See generally Major Kenneth Michael Theurer (USAF), *Sharing the Burden: Allocating the Risk of CERCLA Cleanup Costs*, 50 AFLR 65, 77-78 (2001). Both AIR FORCE LAW REVIEW articles involve mainly domestic allocation concerns between contractors and the government, but help to emphasize the nature of the liability.

¹⁷⁹ See Nilsson, *supra* note 178 at 3 (citing 42 U.S.C. § 9607).

¹⁸⁰ See Theurer, *supra* note 178 at 77-78 (citing S.REP NO. 96-848, at 12-13 (1980), reprinted in, ARNOLD & PORTER LEGISLATIVE HISTORY: P.L. 96-510 and 42 U.S.C. § 9613(f)).

¹⁸¹ See *supra* notes 166 to 169 and accompanying text.

¹⁸² In amplification of this policy decision regarding equitable liability apportionment, see DoDI 4715.8 §§ 5.5, 5.6, and 5.7 (requiring revised residual value calculations for bases being returned to host countries, host nation contributions, and negotiations in accordance with the Instruction, respectively).

¹⁸³ DoDI 4715.8 § 5 at 4-8.

¹⁸⁴ See Carlson, *supra* note 13 at 81-83. Carlson points out the environmental problems left behind at bases in the Philippines and Panama and contrasts those closures to the ongoing agreements leveraged by Germany, Korea, and Japan. A student note (with some inaccuracies) provides a different, scathing review of the U.S. closure of Philippines bases. See M. Victoria Bayoneto, Note: *The Former U.S. Bases in the Philippines: An Argument for the Application of U.S. Environmental Standards to Overseas Military Bases*, 6 FORDHAM ENVTL. LAW J. 111 (Fall 1994). While mostly beyond the scope of this paper, the most essential questions in apportioning overseas liability are: 1) how are the benefits of U.S. presence in the host-nation distributed? 2) to what extent were the contaminating actions unilateral? and 3) what other considerations of the international relationship should bear on the fairness of the distribution? The problem is that the more poor, unequal and desperate the host-nation, the more likely it is that it benefited more greatly from U.S. presence in the country. Admittedly, this analysis contains some level of condescension and patronization and completely ignores a valid political view that the trade-off of temporary military security or temporary economic gain can *never* compensate for permanent physical damage to host-nation resources. However, see DoDI 4715.8.

VII. Why the Current Overseas Compliance Scheme Is Correct and Why There Is Little Room for Change

To begin where my summary of domestic environmental law begins, planning requirements for overseas installations already mimic NEPA through the application of Executive Order 12114. Even what initially appear as critical differences between Executive Order 12114 and domestic NEPA compliance are substantially contained in already existing NEPA exemptions.¹⁸⁵ First, “actions not having a significant effect on the environment”¹⁸⁶ are similarly excluded under domestic NEPA application.¹⁸⁷ Next, “actions taken by the President” are also excluded domestically.¹⁸⁸ Further, while NEPA does not expressly waive compliance in times of war, the CEQ¹⁸⁹ regulations do allow emergency actions prior to NEPA compliance and a method for acquiring a general waiver.¹⁹⁰ Notably, the CEQ granted a very broad waiver for purposes of the Persian Gulf War.¹⁹¹ As far as “intelligence activities and arms transfers” and “export licenses or permits or export approvals” the holdings of cases providing domestic exceptions for secret agency decisions should be fairly applied to equally confidential decision making for programs abroad.¹⁹² Again, these types of foreign

¹⁸⁵ See discussion *supra* note 138 and accompanying text.

¹⁸⁶ Exec. Order 12114 § 2-5(a)(i) (Jan. 4, 1979), 3 C.F.R. 356 (1979), *reprinted as amended in* 42 U.S.C. § 4321 nt. (2002).

¹⁸⁷ See 42 U.S.C. § 4332(C) and 40 C.F.R. § 1508.27. In fact, domestic NEPA compliance only requires analysis for “major Federal actions,” presumably a higher standard than non-major Federal actions. See 40 C.F.R. § 1508.18.

¹⁸⁸ Compare Exec. Order 12114 § 2-5(a)(ii) with 42 U.S.C. § 4332 and 40 C.F.R. § 1508.12.

¹⁸⁹ *Supra* notes 25 and 27, and accompanying text.

¹⁹⁰ Compare Exec. Order 12114 § 2-5(a)(iii) with 40 C.F.R. § 1506.11. Of considerable importance in determining whether Congress intended an emergency waiver, see 42 U.S.C. § 4332. Other than for emergencies, what else could “to the fullest extent possible” mean in the very first sentence implementing NEPA? Clearly, Congress understood that prior planning has practical considerations and reasonable limits.

¹⁹¹ DYCUS, *supra* note 65 at 149 (citing letters from the Secretary of Defense to the CEQ Chairman). The cases where an injunction was sought under NEPA during the Gulf War were defended under the waiver. (DYCUS, *supra* note 65 at 149.) Those cases, however, waived requirements for Environmental Impact Statements for domestic actions that were arguably non-emergency and had significant alternatives for consideration. In the case where actions would be 1) non-domestic, 2) truly emergency, or 3) without practical alternative, I would argue that there exists an implied but unstated, and uncodified exemption. This exemption relies on the inherent constitutional powers of the President to repel invasions and act in the emergency defense of our nation. At times, personnel acting in direct pursuance of presidential directives must take actions that otherwise would be subject to NEPA regulation. While this is as tenuous an argument as can be made without being frivolous, the nature of NEPA as a procedural imposition without the force of penalty, puts the idea of this implied waiver into perspective. Where actions must be taken, and are taken, the court has no decision to make, and is left with little or no recourse. The issue becomes moot. Congress certainly did not intend to unconstitutionally bind the President, and I would further argue that Congress knew and understood that NEPA would never be used to stand in the way of critical national defense actions taken pursuant to necessary delegations of authority.

¹⁹² Compare Exec. Order 12114 § 2-5(a)(iv) with DYCUS, *supra* note 65 at 24-26 (citing *Catholic Action of Hawaii* 454 U.S. at 145 *et al.*).

policy decisions are committed to presidential discretion, anyway. “[V]otes and other actions in international conferences and organizations” have been similarly excluded from NEPA even where the effects would be felt domestically.¹⁹³ “Disaster and emergency relief actions” ordinarily fall under Presidential or congressional action – not within the scope of NEPA.¹⁹⁴ Since Presidential actions, emergency defense actions, and past actions are all generally beyond the reach of NEPA, and overseas installations already comply with NEPA-like processes, the schemes for domestic and overseas environmental impact planning are congruous – a measure of validation for both.

As far as compliance issues, constitutional tensions require that the President set overseas environmental compliance policy for DoD facilities. Congressional legislation is capped where it begins to encroach on the President’s authority to prepare for hostilities and to conduct foreign relations. Notwithstanding certain interpretations of some key holdings, a close review of the statutes show that it is unlikely that Congress intended to limit actions in the true pursuit of national defense objectives. Compliance statutes include ESA, CAA, CWA, and parts of RCRA.

The ESA has already seen litigation regarding overseas application. In *Lujan v. Defenders of Wildlife*,¹⁹⁵ the Supreme Court overturned a circuit court’s decision applying the ESA extraterritorially.¹⁹⁶ The decision to dismiss the case, however, was based on standing issues, not on the underlying question of the extent of ESA jurisdiction. While the extraterritorial reach question remains open, the application to defense agency missions appears to be settled by *Tennessee Valley Authority*. It is my view, however, that even domestically, a great deal of the holding should not apply to the DoD.¹⁹⁷ Since *Tennessee Valley Authority* was litigated in the context of a Department of the Interior question (notwithstanding the thrust of Justice Powell’s dissent), the case for considering national defense factors (or exempting national defense actions) was never appropriately addressed.¹⁹⁸ These arguments are bolstered by constitutional powers in the President regarding national defense and international relations.¹⁹⁹ Currently, the OEBGD makes considerable effort toward creating an equivalent ESA scheme at

¹⁹³ This exemption is extraordinarily difficult to track, but may have some roots in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). The basic thrust of *Kleppe* limits NEPA to requiring analysis only when agency actions have become solidified. The question is generally that of ripeness, with international conferences not considered to be close enough to the implementation of agency action to require review.

¹⁹⁴ Compare Exec. Order 12114 § 2-5(a)(vii) with 40 C.F.R. § 1508.12.

¹⁹⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1995).

¹⁹⁶ See also, Carlson, *supra* note 13 at 88 and Phelps, *supra* note 9 at 51-52.

¹⁹⁷ See *supra* notes 69 and 97.

¹⁹⁸ It must be noted that the ESA allows complete exemptions in the interest of national security. See discussion, *supra* note 36.

¹⁹⁹ See *supra* notes 86 - 100 and accompanying text.

overseas installations.²⁰⁰ As compliance with the ESA becomes more cumbersome, application of the ESA is more likely to change domestically than extraterritorially.²⁰¹ Because the structure of our government provides the President great latitude in foreign relations and the Constitution provides the President certain obligations to provide for national defense needs, overseas application of the ESA *must* be left to the discretion of the President.

As for the CWA, CAA, and the process portions of RCRA, the requirements of these statutes are already substantially integrated via Executive Order 12088. In fact, the Basel Convention (which has not been ratified in the U.S. and therefore has no impact on the domestic handling of hazardous material²⁰²), actually forces a more stringent examination of overseas hazardous waste handling. The CWA and CAA are state-administered programs, and cannot be realistically transferred to administration by foreign entities.²⁰³ Notably, the CAA already includes major exceptions for military equipment, vehicles, and other classes of military equipment. The CWA already has a provision for a nation-wide standard for public vessels. Plus, both statutes create dynamic schemes where relative pollution and local conditions are of paramount importance. As far as comparison goes, U.S. bases are held to standards equal to domestic standards, or standards parallel to their host country industrial facilities. If a foreign air or water quality control scheme were more stringent than its domestic counterpart, and generally applied, our facilities would comply. Little more can be done to provide an appropriate standard from both a health standpoint and a political standpoint. Again, the overseas scheme points out the balance of constitutional commitments of authority between the President and Congress.

As far as the clean-up provisions of RCRA and the liability issues of CERCLA, Congress has already declared the intention to seek contribution by host nations. This is quite simply a policy decision.²⁰⁴ Even more simply, it is a cost/benefit question and centers around money. Congress believes that host countries derive significant benefit from the basing of U.S. forces in those countries. As such, the benefits of agreements for overseas installations are not one-sided, making the liability multi-sided as well. This area has been debated and commented upon,²⁰⁵ but not decisively or notably litigated. Overall, even

²⁰⁰ See *supra* text following note 160.

²⁰¹ See *supra* note 6, and Appendix I.

²⁰² See *supra* note 155.

²⁰³ See discussions, *supra* Section II.

²⁰⁴ See discussion *supra*, accompanying and following notes 177 - 181.

²⁰⁵ See generally Theurer, *supra* note 178, Francisco Orrega Vicuna, *Responsibility and Liability for Environmental Damage Under International Law: Issues and Trends*, 10 GEO. INT'L ENVTL. L. REV. 279 (Winter 1998), and Major Richard M. Whitaker (USA), *Environmental Aspects of Overseas Operations: An Update*, 1997 ARMY LAW. 17 (July 1997). Cf. Nilsson, *supra* note 178, Denise J. De Haan, Note: *New Perspectives on a Familiar Problem: The Defense Reform Act of 1997 Addresses Environmental Hazards at Federal Facilities*, 23 SETON HALL LEGIS. J. 179 (1998), LCol. Anne L.

domestic base cleanup is a hot political topic, and the courts are unlikely to step into an area so clearly and obviously controlled by Congress. For its part, Congress has addressed the political question by pitting its environmental legislation against its military cleanup appropriations. It is squarely a political question to be avoided by the courts.

The application of domestic environmental laws to the military provides an excellent vehicle to study the interplay among the three branches of government, as such laws expose the tenuous balance between various portions of the Constitution. When such schemes are removed from the United States and applied overseas, the effect is striking. By changing location, congressional authority is weakened by the rise of jurisdictional and sovereignty questions, exposing the underlying political questions and their relation to constitutional grants of authority. At the same time, the move overseas strengthens the President's authority by adding his constitutional powers in foreign relations to his already existing authority to prepare for and wage war.

In final summary, congressional encroachment on the President's warfighting capacity evokes constitutional questions of authority. When congressional encroachment occurs via the Commerce Clause (instead of through its own warfighting authority), the outcome should favor Presidential authority, even domestically. When combined with the President's authority to structure foreign policy and conduct foreign affairs, it appears that the President has clear supremacy in deciding overseas environmental policy (with the previously noted exception of funding any related programs). Notably, every major environmental statute provides the President freedom to act domestically in the interests of national security, and none of the major statutes include an express intent for extraterritorial application. While the current overseas environmental regulation scheme is at the discretion of the President and wildly convoluted, it has reached a level of substantial parallelism to U.S. regulation while narrowly avoiding constitutional challenges. As a political issue, environmentalists want more rigorous application of environmental controls while defense authorities want increased freedom in conducting training operations. Both sides, however, have been able to meet their central needs. While further evolution is probable, it is unlikely that further actions by the courts or Congress will fundamentally alter either the domestic or overseas scheme or be the root of significant change.

Burman (USAF) and Maj. Teresa K. Hollingsworth (USAF), *JAG's Deployed: Environmental Law Issues*, 42 A.F.L. Rev. 19 (1997), and Robin R. Churchill and Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 A.J.I.L. 623 (Oct. 2000).

Appendix I

Excerpt from 147 Congressional Record of the House of Representatives 5393, No. 114, September 5, 2001. 147 Cong. Rec. H 5393, 114.

Representative Curt Weldon (Republican, Pennsylvania)

Camp Pendleton, our showcase facility for the Marine Corps. We have allowed the environmental radicals in California to basically take over Camp Pendleton, a monstrous base on the coast of Southern California. As we flew the helicopter up and down the coast, we saw city after city along the California coastline built up to such an extent that one could not see open land.

Therefore, the wildlife and the endangered species have no place to go, not because of anything our military did, but because the city leaders and the planners and the State of California ignored the planning process and allowed families and buildings to be built side by side all along the coastline.

The only open area on the coast of Southern California is Camp Pendleton. The military then becomes the haven for endangered species. So what does the Fish and Wildlife Service say? You at Camp Pendleton cannot do any training if it infringes on endangered species.

What about the rest of the coast of California that caused the endangered species to have to go to Camp Pendleton, the only open area on the coast of Southern California? But no, what we are going to do instead of penalizing the towns is we are going to tell the Marines, "You cannot train here," So Marines, when they do amphibious assault training off the coast, believe it or not, Mr. Speaker, they have to put them on buses and take them under highways to get to the other side of the training area.

Our most widely used and best beach for amphibious training is called Red Beach. I am going to provide an overlay for every Member of Congress. Almost 80 percent of Red Beach, the number one spot for Marine amphibious training, cannot be used because of endangered species. And heaven forbid that a Marine come close to an endangered species, which California ignored while they massively built up their coastline.

That is the way we treat our Marines, those men and women that we send in first to secure the front line capabilities that our military has to have?

CHAPLAINS CAUGHT IN THE MIDDLE: THE MILITARY'S "ABSOLUTE" PENITENT-CLERGY PRIVILEGE MEETS STATE "MANDATORY" CHILD ABUSE REPORTING LAWS

LIEUTENANT SHANE D. COOPER, JAGC, USN*

I. Introduction

The morale of our military's men and women is the backbone of a successful fighting force. The Chaplain Corps is an invaluable asset, crucial to maintaining and gauging morale, as chaplains tend to the needs of service members stationed throughout the world. Chaplains provide a rare conduit for military service members to discuss their deepest problems regarding military, personal, emotional, financial, or family issues.

The vitality of the Chaplain Corps as an open line of communication is due in large part to the military's recognition of a legal privilege protecting some forms of communications with chaplains. Fleet Admiral Chester W. Nimitz commented on the important nature of these privileged communications between military chaplains and service members by stating:

By patient, sympathetic laborers with the crew, day in,
day out, and through many a night, every chaplain I
know contributed immeasurably to the moral courage of
our fighting men.... Most of it was necessarily secret
between pastor and confidant. It is for that toil, in the

* LT Shane D. Cooper (B.A., *College of the Holy Cross*, 1995; J.D., *Cornell Law School*, 2003). Prior to entering the Law Education Program, LT Cooper served as a division officer and Assistant Engineer onboard USS CONNECTICUT (SSN 22). LT Cooper recently served as a summer legal intern to Chief of Naval Operations, Environmental Readiness Division (OPNAV N45). LT Cooper would like to thank Lieutenant Commander David A. Berger, JAGC, USN, former Naval Law Review Editor-in-Chief, for providing this Note's topic; Ryan Norwood, Keisha Hudson, and Malaika Eaton from Cornell Law Review for their comments during the writing process; Professor Stephen Garvey, Cornell Law School for his valuable feedback on an earlier draft; Barry Strom, a member of the faculty of Cornell Law School, Professor Gary Simson, Cornell Law School, Lieutenant Commander Todd Kraft, JAGC, USN, and Reverend John C. Bush for their assistance; and especially his wife, Samantha for her continued patience and support. The viewpoints expressed in this Note do not necessarily express the views of the United States Navy. This article was edited by LT Jonathan Odom, JAGC, USN and LT Dave Peck, JAGC, USN.

cause both of God and country, that I honor the chaplain most.¹

All branches of the Armed Forces regard the penitent-clergy privilege as “absolute” both in-court and out-of-court. Within the military court setting, Military Rule of Evidence 503 (MRE 503) prohibits a chaplain or a chaplain’s assistant from divulging a privileged communication without the consent of the penitent. Furthermore, military regulations have expanded upon the theory behind MRE 503 and also bar the chaplain from disclosing these privileged communications in out-of-court contexts as well.

In sharp contrast to the military’s treatment of the penitent-clergy privilege, an increasing number of states are overriding their respective penitent-clergy privileges by requiring clergy to be mandated reporters in cases of child abuse and molestation. In these states, it is a misdemeanor criminal offense for clergy who fail to report such cases.

The possible conflict between the military’s “absolute” penitent-clergy privilege and various states’ “mandatory” reporting laws begs the question: When a military service member confesses to a chaplain that he or she has abused or molested a child, what does the chaplain do?

This Note aims to accomplish several goals as it answers this question. First, it provides a thorough and informative background and history regarding the penitent-clergy privilege in the civilian community as well as the military’s privilege currently embodied by military regulations and MRE 503. Second, it identifies the competing legal, moral, and ethical considerations that confront the chaplain when faced with possibly conflicting state child abuse mandatory reporting laws. Third, this Note provides a framework for chaplains and judge advocates that may help them identify when a conflict exists and suggests possible methods to settle this conflict. Finally, this Note’s answer to the question facing the chaplain establishes: (1) military chaplains have a legal obligation to maintain the confidentiality of privileged communications under *all* circumstances, civilian or military, in-court or out-of-court; and (2) military chaplains will likely prevail in dismissing an attempt by a state to prosecute under state child abuse mandatory reporting laws. This last question is subject to debate with credible arguments favoring both sides; furthermore, arriving at the answer necessarily involves an interesting and unexpectedly tedious analysis of jurisdictional and federal supremacy clause issues.

II. History of the Penitent-Clergy Privilege

¹ United States v. Isham, 48 M.J. 603, 607 (N.M. Ct. Crim. App. 1998).

A. Early History

The formal recognition of the sanctity and privacy of communications between a penitent and clergy member substantially predates the American military Chaplain Corps.² The Roman Catholic inviolate Seal of Confession provided the impetus for this legal privilege.³ In the fifth century, Pope Leo I recognized the secrecy of confessions⁴ and if a priest violated the Seal it carried a punishment of excommunication from the Church.⁵ The privilege also existed in Anglo-Saxon England as early as the tenth century before the Norman Conquest of 1066.⁶ Even after the Norman invasion, King Canute incorporated the privilege into his secular laws while the Roman Catholic Church was the ruling church in England.⁷ Because most judges in the early English common law system were also Roman Catholic clergy members, the law of the church strongly influenced the English common law.⁸

The sanctity of confession and exclusion of its contents from common law proceedings remained in effect throughout pre-Reformation England but gradually disintegrated shortly after the Reformation of the sixteenth century when the Anglican Church displaced the Roman Catholic Church in England.⁹ At first, the Anglican Church recognized the privilege but by the latter half of the seventeenth century a line of common law cases expressly refused to recognize the penitent-clergy privilege.¹⁰ The exact timing and source of the privilege's demise is a subject of some debate.¹¹ Either the English Parliament's abolition of the Anglican Prayer Book in 1645 and tendency of the Anglican Church to shun "Romish" practices caused the demise of the privilege or Charles II's persecution of the Puritan ministry in the 1660's finally ended the privilege.¹²

B. The Penitent-Clergy Privilege in the United States

² For the most comprehensive discussion of the history and origins of the penitent-clergy privilege, see JOHN C. BUSH & WILLIAM HAROLD TIEMANN, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY AND COMMUNICATION AND THE LAW*, 39-95 (3d ed. 1989). For a survey of the history of the military penitent-clergy privilege, see Captain Michael J. Davidson, *The Clergy Privilege*, ARMY LAW., Aug. 1992, at 19-20.

³ See BUSH & TIEMANN, *supra* note 2, at 42-43.

⁴ *Id.* at 43.

⁵ *Id.* at 44.

⁶ *Id.* at 48.

⁷ *Id.* at 47.

⁸ See Mary Hart Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 736 (1987).

⁹ See generally BUSH & TIEMANN, *supra* note 2, at 58-59.

¹⁰ Mitchell, *supra* note 8, at 737.

¹¹ See BUSH & TIEMANN, *supra* note 2, at 58; Mitchell, *supra* note 8, at 736-37.

¹² *Id.*

Sir William Blackstone did not mention the penitent-clergy privilege in his treatise authored just before the American Revolution.¹³ Thus, most commentators and courts believe that the American penitent-clergy privilege is a creature of statute because it did not exist in the common law at the time of the American Revolution.¹⁴

However, to say that the penitent-clergy privilege is necessarily a creature of statute is not quite correct. Although all states now recognize the privilege by statute,¹⁵ the American penitent-clergy privilege actually was founded by a decision of a New York State court in 1813.¹⁶ The basis for the decision rested neither upon the common law nor statute but rather upon the state constitutional right to the freedom of expression of religion.¹⁷ A controversy over the privilege ensued just four years later when another New York State court refused to recognize the privilege.¹⁸ The New York legislature eventually weighed in on the matter and adopted the nation's first statute recognizing the penitent-clergy privilege in 1828.¹⁹ Since then, every state has followed New York's lead and has mandated some form of the penitent-clergy privilege by statute.²⁰

Analyzing the federal form of the penitent-clergy privilege also weakens the conclusion that the privilege is solely a creature of statute. The privilege only exists in federal courts as a matter of federal common law because there is no federal statute or federal rule of evidence that codifies the privilege.²¹ Federal courts implicitly recognized the privilege as early as 1875.²² For many years, the federally recognized privilege remained dormant until the Court of Appeals for the District of Columbia reaffirmed that the privilege was a matter of federal common law.²³

¹³ Mitchell, *supra* note 8, at 737.

¹⁴ See CAPTAIN JOE H. MUNSTER, JR. & CAPTAIN MURL A. LARKIN, *MILITARY EVIDENCE*, 318-19 n.51 (2d ed. 1978). See also Davidson, *supra* note 2, n.15; Mitchell, *supra* note 8, n.75 (citing several cases and commentators).

¹⁵ See Mitchell, *supra* note 8, at 740.

¹⁶ See *id.* at n.76 (citing *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813) which was never officially published).

¹⁷ *Id.* at 737.

¹⁸ See *id.* at n.76 (citing *People v. Smith*, 2 City Hall Rec. (Rogers) 77 (N.Y. 1817) which was never officially published).

¹⁹ *Id.*

²⁰ See *id.* at 740.

²¹ See Mitchell, *supra* note 8, at 741.

²² See *Totten v. United States*, 92 U.S. 105, 107 (1875) (stating "as a general principle, that public policy forbids the maintenance of any suit. . . . [O]n this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional.").

²³ *Mullen v. United States*, 263 F.2d 275, 276 (D.C. Cir. 1958).

Efforts to federally codify all the forms of privilege such as husband-wife, attorney-client, and penitent-clergy failed in 1972 when Congress declined to accept certain portions of the Supreme Court's proposed Federal Rules of Evidence.²⁴ Congress declined to adopt an elaborate set of privileges and instead deferred to common law decisions and state statutes when it adopted Federal Rule of Evidence 501 (FRE 501).²⁵ Thus, when state substantive law is at issue, the federal courts defer to the specific state's privilege rules.²⁶ According to the Report of the House Committee on the Judiciary, another reason for the adoption of the general FRE 501 was to eliminate forum shopping in civil cases.²⁷ Later, the Supreme Court continued to recognize the penitent-clergy privilege in the federal courts in *Trammel v. United States*²⁸ and the United States Court of Appeals of the Third Circuit further ensonced the penitent-clergy privilege as part of the federal common law in 1990.²⁹

III. Military Penitent-Clergy Privileged Communications

A. A Haphazard Beginning: The Road to Military Rule of Evidence 503

At first, the American military did not recognize the penitent-clergy privilege.³⁰ In 1868, Lieutenant Colonel Stephen Vincent Benet lamented in his treatise on military law that the penitent-clergy privilege did not exist in military proceedings.³¹ Lieutenant Colonel Benet argued that the privilege should have existed for Roman Catholics in the military following the examples of contemporaneous New York and Missouri statutes that had already codified the privilege.³²

Confusion ensued in 1917 when the *Manual for Courts-Martial* (MCM) did not recognize the penitent-clergy privilege, while, Paragraph 46 1/2 of Army Regulations (AR) of 1917 contradicted the MCM by recognizing a limited form of

²⁴ See JACK B. WEINSTEIN, ET. AL., EVIDENCE: 2001 RULES, STATUTE AND CASE SUPPLEMENT 59 (2001) (providing excerpts from Note by Federal Judicial Center and House Committee on the Judiciary).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ 445 U.S. 40 (1980).

²⁹ In Re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990).

³⁰ LIEUTENANT COLONEL STEPHEN VINCENT BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL, 304 (1868).

³¹ *Id.*

³² *Id.*

the privilege.³³ Paragraph 46 1/2 required chaplains to counsel enlisted soldiers under arrest before trial and declared that all “communications, verbal or written, between a chaplain and an enlisted service member subject to trial or discipline shall be treated as confidential and privileged.”³⁴

However, the Army revoked that privilege in 1925 when it published a new system of regulations that omitted the provisions of Paragraph 46 1/2.³⁵ Later editions of the Army MCM in 1928 and the Naval Courts and Boards of 1937 also did not recognize the penitent-clergy privilege.³⁶

Although the MCM and regulations uniformly rejected the privilege from the 1920’s to 1940’s, certain events appear to have changed the military’s stance on the issue. The shift to the military’s eventual recognition of the penitent-clergy privilege began in World War II.³⁷ In 1943, a chaplain refused to testify before a Board of Inquiry regarding the theft of an officer’s funds.³⁸ The chaplain insisted that the basis of his knowledge, although not from a confessional, was privileged.³⁹ Preparations were underway to prosecute the chaplain for his failure to testify, but a higher authority in Army headquarters spared the chaplain by forbidding the prosecution.⁴⁰

Colonel Roy Honeywell, a Chaplain Corps historian, noted that cases such as the one described above, led the Army to adopt the policy of affording privileged status to penitent-clergy communications in 1946.⁴¹ A Bulletin by the Judge Advocate General of the Army contains a directive recognizing the privileged status of penitent-clergy communications and later that year AR 60-5 reaffirmed this.⁴² For the first time in 1949, the Army MCM also mentioned the penitent-clergy privilege.⁴³ However, it was not until 1951, when Congress and the President unified the military justice systems of the Armed Forces, that the MCM applied the penitent-clergy privilege to all branches of the military.⁴⁴

³³ Compare JUDGE ADVOCATE GENERAL’S OFFICE, SECRETARY OF WAR, A MANUAL FOR COURTS-MARTIAL 1917, 100-01 (1917) with COLONEL ROY J. HONEYWELL, CHAPLAINS OF THE UNITED STATES ARMY, 297 (1958).

³⁴ HONEYWELL *supra* note 33, at 297.

³⁵ *Id.*

³⁶ See *United States v. Coleman*, 26 M.J. 407, 409 n. 3 (C.M.A. 1988).

³⁷ See HONEYWELL *supra* note 33, at 296-97.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² BULLETIN OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, VOL. V, NUMBER 1, 4 (Jan. 1946); see HONEYWELL *supra* note 33, at 296-97.

⁴³ JUDGE ADVOCATE GENERAL OF THE ARMY’S OFFICE, MANUAL FOR COURTS-MARTIAL U.S. ARMY 1949, 182-83 (1949).

⁴⁴ See Exec. Order No. 10,214, 16 Fed. Reg. 1303 (February 8, 1951).

Today, Military Rule of Evidence 503 (MRE 503) codifies the penitent-clergy privilege.⁴⁵ This codification resulted from a gradual transformation that occurred from 1951, when the first uniform MCM was published, to 1980. Originally, MCM Chapter XXVII contained the military's rules of evidence that included paragraph 151b's discussion of the penitent-clergy privilege.⁴⁶ Then, President Jimmy Carter issued an Executive Order in 1980 that significantly altered the format and appearance of the military rules of evidence while maintaining the basic substance of the rules.⁴⁷ Essentially, President Carter's Executive Order removed Chapter XXVII from the MCM and created a stand-alone section entitled, "The Military Rules of Evidence."⁴⁸ The intention of this change was to make it "clear that military evidentiary law should echo the civilian federal law to the extent practicable, but should also ensure that the unique and critical reasons behind the separate military criminal legal system be adequately served."⁴⁹

Although the MRE echoes the FRE, there are three important distinctions worth mentioning for the purposes of this Note. First, the President promulgated the MRE through an Executive Order and derives his authority to promulgate rules and procedures for the military justice system under Article 36 of the Uniform Code of Military Justice.⁵⁰ Because the President is acting within the statutory authority assigned by Congress, the MRE has the force of law.⁵¹

Second, the MRE unlike the FRE was not subjected to any scrutiny or review by Congress.⁵² The Evidence Working Group of the Joint-Service Committee on Military Justice drafted the MRE and consisted of representatives from the General Counsel of the Department of Defense, the United States Court of Military Appeals, the Military Departments, and the Department of Transportation.⁵³ Within a relatively short two-year span, the Department of Defense approved the MRE and forwarded them to the White House where the Executive branch made the final approval and promulgated them.⁵⁴

Finally, MRE Article V adopted enumerated and specific rules of privilege similar to the ones rejected by Congress in contrast to the more general FRE 501.⁵⁵ The MRE drafters supported their decision to adopt specific rules of

⁴⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, Mil. R. Evid. 503 (2000) [hereinafter MRE 503].

⁴⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. 27 at 60 (1959).

⁴⁷ See Exec. Order No. 12,198, 45 Fed. Reg. 16932 (March 12, 1980).

⁴⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 22 at 1 (2000) [hereinafter MCM].

⁴⁹ *Id.* at app. 22 at 61.

⁵⁰ STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE at ix-x (4th ed. 1997).

⁵¹ *Id.* at x.

⁵² See MCM, *supra* note 48, app. 22 at 1; SALTZBURG, *supra* note 50, at xi.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ SALTZBURG *supra* note 50, at xii.

privilege because they felt that the military justice system needed far more stability than civilian law systems.⁵⁶ MRE 501 strikes a compromise by incorporating federal common law decisions insofar as they are practicable and consistent with the Uniform Code of Military Justice while also promulgating specific rules of privilege in MRE 502-509.⁵⁷ It is within these specific rules of privilege in MRE 503 that the penitent-clergy privilege has taken up final residence.

B. Military Rule of Evidence 503 as Explained by Case Law

Military Rule of Evidence 503 provides:

Communications to clergy

(a) *General rule of privilege.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) *Definitions.* As used in this rule:

- (1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.
- (2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.
- (c) *Who may claim the privilege.* The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's

⁵⁶ MCM, *supra* note 48, app. 22 at 38.

⁵⁷ *Id.*

assistant to do so is presumed in the absence of evidence to the contrary.⁵⁸

Very few military cases have applied MRE 503.⁵⁹ The first and leading case of this group of cases is *United States v. Moreno*.⁶⁰ In *Moreno*, a married Army soldier shot and killed his lover with whom he was involved in an extra-marital affair.⁶¹ Moreno was a Catholic but could not find any priests available on the day he went to the base chapel.⁶² Instead, he sought out a Baptist chaplain and confided his story to the chaplain.⁶³ The Baptist chaplain provided a statement to law enforcement officials without Moreno's consent that helped to convict Moreno.⁶⁴ The *Moreno* court analyzed Moreno's appeal by using a three-part test under MRE 503 that led it to suppress the chaplain's statement and reverse Moreno's conviction based on a violation of the penitent-clergy privilege.⁶⁵

The *Moreno* three-part test requires that all of the following conditions be met before a court can deem a communication to be privileged between the penitent and chaplain: "(1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as spiritual advisor or to his assistant in his official capacity; and (3) the communication must be intended to be confidential."⁶⁶

In 1998, *United States v. Isham*⁶⁷ further elaborated upon MRE 503 and the three-part *Moreno* test. In *Isham*, a Marine under great stress and suffering depression communicated his suicidal feelings and desires to harm others to his battalion chaplain.⁶⁸ However, at the outset of the meeting the chaplain explained to the Marine that he would have to report certain items to the chain of command for safety reasons if he felt necessary.⁶⁹ Isham agreed to this qualification at the

⁵⁸ MRE 503, *supra* note 45.

⁵⁹ A detailed search revealed only eight cases regarding the military penitent-clergy privilege since 1985. *United States v. Moreno*, 20 M.J. 623 (A.C.M.R. 1985) (leading case); *United States v. Garries*, 19 M.J. 845 (A.F.C.M.R. 1985); *United States v. Beattie*, No. 25938 (A.F.C.M.R. Aug. 7, 1987); *United States v. Coleman*, 26 M.J. 407 (C.M.A. 1988); *United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R. 1992); *United States v. Napoleon*, 46 M.J. 279 (1997); *United States v. Isham*, 48 M.J. 603, 606 (N.M. Ct. Crim. App. 1998); *United States v. Benner*, 55 M.J. 621 (Army Ct. Crim. App. 2001). For a brief discussion of most of the cases listed above, see Evidence Study Guide 2001 Ch. 5, Naval Justice School Publication (2001).

⁶⁰ 20 M.J. 623 (A.C.M.R. 1985).

⁶¹ *Id.* at 624.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 624-25.

⁶⁵ *Id.* at 627.

⁶⁶ *Id.* at 626.

⁶⁷ 48 M.J. 603 (N.M. Ct. Crim. App. 1998).

⁶⁸ *Id.* at 604.

⁶⁹ *Id.*

outset of the meeting and thus the *Isham* court found it acceptable that the chaplain used this information to warn others in the command of Isham's desire to harm others.

However, in applying the *Moreno* test, the court took an "expansive"⁷⁰ reading of the definition of confidential communications under MRE 503(b)(2) and held that the chaplain's statements were inadmissible in court.⁷¹ The court reasoned that the chaplain could disclose Isham's statements for the limited purpose that was agreed upon by Isham at the outset of the meeting, namely, to provide for the safety of Isham's fellow Marines on the rifle range.⁷² However, the *Isham* court concluded that to allow use of the statement in a court-martial proceeding would, "largely destroy the effectiveness of members of the Chaplain Corps. Navy chaplains play a vital role in carrying out the mission of the Navy and Marine Corps."⁷³ As the court explained, "[t]o carry out their mission of providing spiritual and moral guidance and succor during times of personal crisis, military chaplains must develop and keep the trust of those they serve."⁷⁴

The *Isham* court's holding is significant in two respects. First, the court articulated that once the three prongs of *Moreno* were satisfied, the privilege was "absolute."⁷⁵ In other words, nothing can compel disclosure of penitent-clergy communications.⁷⁶ More importantly, the *Isham* decision demonstrated how important the court valued the policy justifications for the absolute privilege as evidenced by the expansive reading it gave to the *Moreno* test. *Isham* exemplifies the strong statement that the military courts have made in support of the military chaplain's mission and the absolute privilege afforded to penitents and chaplains. In this relatively new body of military penitent-clergy jurisprudence, *Isham* stands out as the high-water mark for rights afforded to penitent-defendants in criminal cases under MRE 503.

In 2001, the United States Army Court of Criminal Appeals applied MRE 503 and commented further on the penitent-clergy privilege in *United States v. Benner*.⁷⁷ In *Benner*, an Army sergeant molested and sodomized his four-year-old stepdaughter.⁷⁸ After his wife found out and left him and while feeling guilt-

⁷⁰ *Id.* at 606.

⁷¹ *Id.* at 606-07.

⁷² *Id.*

⁷³ *Id.* at 606.

⁷⁴ *Id.* at 607.

⁷⁵ *Id.* at 606.

⁷⁶ *Id.*

⁷⁷ 55 M.J. 621 (Army Ct. Crim. App. 2001) *rev'd*, 57 M.J. 210 (2002). The United States Court of Appeals for the Armed Forces reversed the decision by the Army Court of Appeals in the summer of 2002. However, the reversal was based upon factors beyond the scope of this Note that do not affect the Army Court of Appeals' helpful discussion regarding the penitent-clergy privilege.

⁷⁸ *Id.* at 622-23.

ridden, Benner sought out unsuspecting Chaplain S one Sunday evening.⁷⁹ Benner relayed the graphic details of his abuse and treatment of his stepdaughter to Chaplain S. Chaplain S stopped him and told Benner that he believed he was under an obligation to report the incidents to law enforcement officials and set up an appointment to see Sergeant Benner the following day.⁸⁰

In the meantime, the chaplain contacted officials at the Army Family Advocacy Program (FAP)⁸¹ and asked one of its officials about his potential duty to report the incident. According to the *Benner* court, the Army FAP official erroneously instructed Chaplain S that he was under a duty to report the incident.⁸² On the contrary, Army Regulation 165-1, paragraph 4-4(m)(2) directs that, “[t]he chaplain and chaplain assistant will not divulge privileged communications without the written consent of the person(s) authorized to claim the privilege.”⁸³ After Chaplain S erroneously told Sergeant Benner the next day that he was under a duty to tell law enforcement officials about the incidents, Benner decided to turn himself in.⁸⁴ The government convicted Benner based upon his confession.⁸⁵

For the limited purposes of this Note, *Benner* raises one major consideration: the distinction between MRE 503 that strictly applies to formal military proceedings versus out-of-court situations regarding privileged communications. MRE 503’s scope as a rule of evidence is limited solely to questions of admissibility or exclusion in all stages of a *formal* military proceeding such as a court-martial or investigative hearing.⁸⁶ In contrast, for out-of-court settings regarding privileged communications, each branch of the military promulgates regulations, the Chaplain Corps organizations publish Codes of

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ The Department of the Army established the Army Family Advocacy Program to promote and enforce Department of Defense policies regarding the prevention, identification, reporting, investigation, and treatment of spouse and child abuse. U.S. DEP’T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM, para. 1-1 (1 Sept. 1995) [hereinafter AR 608-18]. Similarly, the Navy and Air Force also have established analogous programs within their organizations. See e.g., U.S. DEP’T OF AIR FORCE, SECRETARY OF THE AIR FORCE POLICY DIR. 40-3, FAMILY ADVOCACY PROGRAM (7 Sept. 1993) [hereinafter SECAF DIR. 40-3]; U.S. DEP’T OF NAVY, SECRETARY OF THE NAVY INSTR. 1752.3A, FAMILY ADVOCACY PROGRAM (26 Mar. 1997) [hereinafter SECNAVINST. 1752.3A]; See generally, U.S. DEP’T OF DEFENSE, DIR. 6400.1, FAMILY ADVOCACY PROGRAM (23 Jun. 1992) [hereinafter DOD DIR. 6400.1].

⁸² *Benner* 55 M.J. at 624-25.

⁸³ U.S. DEP’T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY, para. 4-4(m)(1) (26 May 2000) [hereinafter AR 165-1].

⁸⁴ *Benner*, 55 M.J. at 623.

⁸⁵ *Id.* This conviction was ultimately reversed but on unrelated grounds, see *supra* note 77.

⁸⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, Mil. R. Evid. 1101(b) (2000); see MCM app. 22 at 37-38.

Ethical Conduct, and each religious faith espouses beliefs regarding confidential communications.⁸⁷

C. Penitent-Clergy Privileged Communications Discussed by Military Regulations

The Navy and Marine Corps, Army, and Air Force each have promulgated military regulations regarding privileged communications with a chaplain, which are separate and distinct from the evidentiary rule. Presumably, MRE 503 solely governs the exclusion of privileged communications within formal military justice proceedings while the military regulations regulate and provide guidance on how to treat privileged communications outside of formal proceedings.⁸⁸ The Department of Defense promulgates military regulations as rules under the authority of the President's rulemaking powers granted by Congress.⁸⁹ Courts have held that military regulations have the force of law.⁹⁰

1. Navy and Marine Corps Regulations

The Navy and Marine Corps regulations on privileged communications with clergy are not as explicit as the Army's or Air Force's. Secretary of the Navy Instruction (SECNAVINST) 1730.7A (1)(h)(3) simply states that chaplains must safeguard privileged communications subject to the limitations of MRE 503.⁹¹ The Navy and Marine Corps also have established the Navy Family Advocacy Program (FAP) governed by SECNAVINST 1752.3A.⁹² The Navy FAP seeks to prevent spousal and child abuse in military families. While the Navy FAP encourages the reporting of suspected child and spouse abuse, it specifically recognizes and maintains a reporting exception for penitent-clergy privileged communications.⁹³

2. Army Regulations

The Army treats the area of privileged communications in greater depth than the Navy and Marine Corps. AR 165-1 defines privileged communications by using the same definition provided for in MRE 503.⁹⁴ AR 165-1 also states that the chaplain may not divulge privileged communications without the

⁸⁷ See Part II.D *infra*.

⁸⁸ See *Benner*, 55 M.J. at 624-25.

⁸⁹ 5 USC § 301 (2001).

⁹⁰ See *United States v. Hutchins*, 4 M.J. 190, 192 (C.M.A. 1978).

⁹¹ U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 1730.7A, RELIGIOUS MINISTRIES WITHIN THE DEPARTMENT OF THE NAVY (2 September 1993) [hereinafter SECNAVINST 1730.7A].

⁹² SECNAVINST 1752.3A, *supra* note 81.

⁹³ *Id.* para. 6(c) and encl. 2, para. 5.

⁹⁴ AR 165-1 *supra* note 83.

declarant's written consent.⁹⁵ However, paragraph m(3) of AR 165-1 hedges when it instructs, "[s]ituations may arise where disclosure of communications by chaplains and chaplain assistants is not provided for by the rules of evidence or statute, or is not clear from current court decisions. In cases of this kind, chaplains...are advised to seek legal counsel from the Staff Judge Advocate...."⁹⁶

The Army also discusses privileged communications within the context of AR 608-18 that promulgates guidance on the Army FAP.⁹⁷ The Army FAP guidelines also instruct, "uniformed or civilian member[s] of the clergy working for the military ha[ve] no obligation to make a report of spouse or child abuse that comes to his or her attention as a result of a privileged communication."⁹⁸ However, the Army FAP does encourage the chaplain to, "encourage a person who is a victim or perpetrator of spouse or child abuse to make a report of such abuse or to seek treatment...."⁹⁹

3. Air Force Regulations

The Air Force, similar to the Army, is also explicit about the scope of privileged communications. Air Force Instruction (AFI) 52-101 adopts the same definition of privileged communications from MRE 503 and then instructs its chaplains, "[t]here are no circumstances where a chaplain can disclose privileged communications revealed in the practices of his/her ministry without the client's informed permission."¹⁰⁰

The Air Force has issued two opinion letters on the issue of privileged communications. First, in 1996, Headquarters United States Air Force, Office of the Judge Advocate General for the Air Force wrote an opinion letter that has provided the most extensive discussion of the scope and extent of privileged communications with clergy in the military.¹⁰¹ The opinion letter states that in the military justice setting, the evidentiary privileges under MRE 503 were fairly well

⁹⁵ *Id.* at para. 4-4(m)(2).

⁹⁶ *Id.* at para. 4-4(m)(3).

⁹⁷ AR 608-18, *supra* note 81.

⁹⁸ *Id.* at app. E, para. 5.

⁹⁹ *Id.*

¹⁰⁰ U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 52-101, CHAPLAIN PLANNING AND ORGANIZING, para. 4.1 (1 May 2001) [hereinafter SECAF INSTR. 52-101].

¹⁰¹ Letter, Headquarters United States Air Force/Office of The Judge Advocate General, HQUSAF/JAG, subject: Scope and Extent of Clergy Communication Privilege (24 July 1996) *reprinted in* U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE MANUAL. 52-103, CHAPLAIN SERVICE READINESS MANUAL, attachment 10 (1 December 1997) [hereinafter SECAF MAN. 52-103 ATTACHMENT 10].

defined and regarded as “absolute.” However, the letter acknowledges that, “[t]here is no per se rule of law requiring recognition of an absolute privilege of confidentiality in the non-criminal or non-judicial setting.”¹⁰²

Nonetheless, the 1996 Air Force opinion letter concluded that the privilege must also be absolute in other applications such as non-criminal and non-judicial settings.¹⁰³ This conclusion comports with AFI 52-101 and AR 165-1 that seem to state the same restriction. However, similar to the Army’s hedge of its bets in AR 165-1 m(3), the Air Force opinion letter limits itself in its closing paragraphs by stating, “communications...should be absolutely privileged against officially compelled disclosure to the *Air Force* (emphasis added to original).”¹⁰⁴ Furthermore the letter also equivocates by stating, “[t]he extent to which the confidential communications may be voluntarily compromised ... must rest within the conscience of the individual chaplain, under the tenants of his particular religion, pursuant to guidance from the Chaplain’s service, and after a balancing of religious tenants against the instant harm....”¹⁰⁵

However, in 1999, the Air Force Chief of the Chaplain Service issued a follow-up letter that backs away from the hedged statement of 1996 by reasserting, “[t]he privilege of absolute confidentiality in communications with chaplains belongs to *the client*, not to the chaplain.... There should be no misunderstanding: It is the policy of the United States Air Force Chaplain Service that under no circumstances (except with a client’s consent) will a chaplain ever compromise the privilege.”¹⁰⁶ However, the letter also implicitly limits the scope of the letter to inter-Air Force situations by directing that, “Air Force authorities will never require a chaplain to disclose privileged information for any reason whatsoever.”¹⁰⁷

One can conclude from examining the various military regulations and policy statements that each branch deals with the topic of privileged communications outside of the formal military justice setting in slightly differing depths and manner. Furthermore, the 1996 Air Force opinion letter makes it clear that the law has not fully developed nor is well litigated regarding privileged communications outside formal military justice settings.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Letter, Headquarters United States Air Force/Office of The Chief of the Chaplain Service, HQUSAF/HC, subject: Privileged Communications with Chaplains (4 June 1999) *available at* <http://www.usafhc.af.mil/Attachments/PolicyLtrs/privilegedcomm.doc>.

¹⁰⁷ *Id.*

D. Chaplain's Professional Code of Conduct and Various Religious Groups' Beliefs Regarding Penitent-Clergy Privileged Communications

Apart from military regulations, professional guidance from the Chaplain Corps and the chaplain's particular faith group also enter into the calculus of determining whether to disclose a privileged communication. The National Conference on Ministry to the Armed Forces, a combination of religious faiths that endorses clergy for the military, has created a Covenant and Code of Ethics for Chaplains of the Armed Forces. The Code of Ethics states, "I will hold in confidence any privileged communication received by me during the conduct of my ministry. I will not disclose confidential communications in private or public."¹⁰⁸

When examining the guidance of particular faith groups, the advice is as varied as the groups themselves.¹⁰⁹ The Roman Catholic Church still holds the Seal of Confession inviolate.¹¹⁰ A Catholic chaplain is required by his faith not to divulge the contents of privileged communications regardless of any legal requirement. The Lutheran, Anglican, Episcopalian, and Methodist faiths also recognize the importance of keeping privileged communications confidential.¹¹¹ However, the Lutheran and some branches of the Methodist Church have made an exception to allow its clergy to divulge communications that would prevent the future commission of a crime.¹¹² Reformed churches such as the Presbyterian Church also safeguard parishioner-clergy communications but not at the utmost level like Roman Catholics.¹¹³ Two other faith groups, namely the Baptist Church and Judaism tend to regard the privacy of penitent-clergy communications in a lesser light if there are other circumstances like the possible prevention of crime involved.¹¹⁴ In fact, to some followers, Jewish law commands Jewish rabbis just like any Jew to report domestic abuse and child abuse to civil authorities.¹¹⁵ Within the Jewish Conservative movement, rabbis must report cases of abuse to civil authorities.¹¹⁶

¹⁰⁸ See SECAF MAN. 52-103 ATTACHMENT 10, *supra* note 101 (quoting statement from National Conference on Ministry to the Armed Forces).

¹⁰⁹ For a detailed survey of various faith group's views on privileged communications, see BUSH & TIEMANN, *supra* note 7, 42-95; see also Seymour Moskowitz & Michael J. DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect*, 49 DEPAUL L. REV. 1, 4-21 (1999).

¹¹⁰ BUSH & TIEMANN, *supra* note 2, 42-3.

¹¹¹ Moskowitz & DeBoer, *supra* note 109, 9-15.

¹¹² *Id.* at 15-16.

¹¹³ *Id.* at 13.

¹¹⁴ *Id.* at 16-20.

¹¹⁵ *Id.* at 19.

¹¹⁶ *Id.*

As alluded to in the Introduction, the military chaplain faces several competing considerations in the area of privileged communications. MRE 503 provides the universal definition for privileged penitent-clergy communications within the military context. Cases such as *Moreno* and *Isham* establish the “absolute” nature of the evidentiary privilege under MRE 503 that excludes the use of privileged communications within military justice proceedings. However, *Benner* also illustrates the distinction of in-court and out-of-court treatment of privileged communications with chaplains. Military regulations, opinion letters, professional codes of conduct, various faith groups’ beliefs, and a lack of case law and precedent provide somewhat conflicting guidance as to when, how, or whether a chaplain may disclose the contents of privileged communications outside the stages of a formal military proceeding.

IV. State Child Abuse Mandatory Reporting Laws and the Prosecution of Clergy¹¹⁷

A. A Brief Overview

Every state now has a child abuse and molestation mandatory reporting statute.¹¹⁸ Included in each statute is a mandatory reporting law that generally makes it a misdemeanor crime for certain individuals, usually enumerated by statute, who fail in their duty to report suspected child abuse or molestation. In a number of states the mandatory reporting law applies to all citizens and in a modest number of others, clergy are mandated reporters.¹¹⁹

The birthplace of child protection laws is a landmark report by the Children’s Bureau of the Department of Health, Education, and Welfare in 1963.¹²⁰ The Department proposed a model statute that initially required physicians to report suspected cases of abuse and abrogated judicially recognized physician-patient and husband-wife privileges.¹²¹ By 1967, every state had adopted some form of child protection law with a mandatory reporting requirement.¹²²

¹¹⁷ Professor Mitchell’s article, *supra* note 8, is the authoritative law review article on this topic.

¹¹⁸ BUSH & TIEMANN, *supra* note 2, 178.

¹¹⁹ See generally *Child Abuse and Neglect State Statutes Series, Ready Reference, Reporting Laws: Clergy as Mandated Reporters*, National Clearinghouse on Child Abuse and Neglect Information (2002) available at <http://www.calib.com/nccanch/pubs/readref/mandclergy.pdf> [hereinafter Clearinghouse Report]; *Child Abuse and Neglect Statutes at a Glance: Mandatory Reporters of Child Abuse and Neglect*, National Clearinghouse on Child Abuse and Neglect Information (April 2000), available at <http://www.calib.com/nccanch/pubs/sag/mandarep.pdf>.

¹²⁰ Mitchell, *supra* note 8, at 726.

¹²¹ *Id.*

¹²² *Id.*

Today, at least twenty-nine states' mandatory reporting laws affect clergy.¹²³ However, as these fairly recent statutes were passed, they intersected with the penitent-clergy privileges that already existed in these states. Of the twenty-nine states, three categories emerge as to how to deal with the apparent conflict between the penitent-clergy privilege and newer mandatory reporting laws.¹²⁴ Sixteen states recognize a limited form of protection of "pastoral communications." Eight states are silent and have not addressed the apparent conflict in the law.¹²⁵ However, five states: New Hampshire, North Carolina, Rhode Island, West Virginia, and Texas have specifically abrogated the privilege in the mandatory reporting statute.¹²⁶ Thus, in these states, it is quite clear that the privilege does not legally protect the clergy member from criminal prosecution when he or she fails to report child abuse or molestation.

B. Examples of Prosecution of Clergy

The most famous example of a clergy member's prosecution for refusing to disclose penitent-clergy communications is the 1984 case of Reverend John Mellish, who served as the pastor for the Church of Nazarene in Margate, Florida.¹²⁷ The Broward County prosecutor subpoenaed Reverend Mellish to give a deposition regarding a case of sexual battery to child under the age of eleven.¹²⁸ The suspect had regularly attended Reverend Mellish's church for nearly a year.¹²⁹ Reverend Mellish refused to give a statement to the prosecutor and later refused to testify when summoned by a Broward County Judge citing the sacred trust that he could not break in his religious relationship with the suspect.¹³⁰ Reverend Mellish spent a night in jail for contempt of court, was released on bond, and faced a possible sixty days of confinement for not complying with the court order.¹³¹ His case raised national awareness when the television newsmagazine *60 Minutes*

¹²³ See Clearinghouse Report, *supra* note 119 at 4. Of the twenty-nine states: Thirteen states specifically name members of the clergy as mandated reporters in their statutes (Arizona, California, Connecticut, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, and West Virginia). Sixteen other states generally require all persons to report child abuse without an exception to protect clergy's privileged communications (Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming). See also Appendix A, *infra*, chart of states summarizing mandatory reporting laws.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ BUSH & TIEMANN, *supra* note 2, at 23-24. Pastor Mellish's case is mostly unpublished but the dismissal of charges order is reported as *Mellish v. State*, No. 84-1930 (Fla. Dist. Ct. App. Aug. 30, 1985).

¹²⁸ *Id.*

¹²⁹ *Id.* at 24.

¹³⁰ *Id.*

¹³¹ *Id.*

aired his story. Eventually, the Broward County judge dismissed the charges against him.¹³²

In contrast to mandatory reporting statutes that directly implicate clergy, there are a number of states that indirectly affect clergy who also serve as childcare custodians. For example, although California provides an exception for pastoral communications with clergy in its mandatory reporting laws, it did not excuse clergy at the South Bay United Pentecostal Church in California from prosecution for violating the mandatory reporting laws.¹³³ A California court affirmed a jury conviction that found a pastor and assistant pastor guilty for the misdemeanor offense of failing to report cases of suspected child abuse while serving in their duties as childcare custodians at South Bay Christian Academy.¹³⁴ Thus, any member of the clergy who operates in dual roles such as a religious school administrator or licensed counselor must be aware that their clergy status might not absolve them from liability.

V. Legislative Jurisdictions and Federal Supremacy

Military chaplains and the Staff Judge Advocates that advise them may sense that jurisdictional or federal supremacy issues insulate the chaplain from state mandatory reporting laws. Part V will apply these doctrines in further detail and the following sub-parts will generally describe them.

A. Legislative Jurisdictions

The term “legislative jurisdiction” refers to a government’s power to legislate and enforce laws on a particular tract of land.¹³⁵ Whenever the federal government approaches a state to acquire land for a military base, usually, the state holds exclusive control of the tract of land. During the acquisition process, the federal government and state or local government will reach an agreement as to what form of legislative jurisdiction each party exercises over the land. There are four basic forms of legislative jurisdiction arrangements: (1) exclusive; (2) concurrent; (3) partial; and (4) proprietary interest.¹³⁶

In an exclusive legislative jurisdiction, sometimes referred to as an enclave, the federal government holds complete authority over the tract of land.¹³⁷

¹³² Mitchell *supra* note 8 at n.1.

¹³³ People v. Hodges, 13 Cal. Rptr. 2d 412 (Cal. App. Dep’t Super. Ct. 1992).

¹³⁴ Hodges, 13 Cal. Rptr. 2d at 421.

¹³⁵ See generally U.S. DEP’T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION (1 Aug. 1973) [hereinafter AR 405-20].

¹³⁶ See THE JUDGE ADVOCATE’S GENERAL SCHOOL, UNITED STATES ARMY, JA-221, LAW OF MILITARY INSTALLATIONS DESKBOOK, ch. 2 at 54-60 (1996) [hereinafter JA-221].

¹³⁷ AR 405-20 *supra* note 135 at para. 4a.

In this case, the state has ceded almost all authority over the land with the possible exception of having the right to serve judicial process for state proceedings. Thus state civil and criminal laws do not apply directly to the exclusive jurisdiction. However, some state criminal laws will still apply to enclaves through the federal Assimilative Crimes Act (ACA)¹³⁸ but will only apply to the extent that the state law does not conflict with federal laws or military regulations.

In concurrent legislative jurisdictions, both the state and federal government have the power to exercise their respective authorities.¹³⁹ Therefore, the state may enforce its civil or criminal laws to the extent that they are not preempted by federal supremacy considerations.

In partial legislative jurisdictions, the state will specifically grant some authority to the federal government and will expressly reserve other powers for itself. For example, Iowa provides a clause in various acquisition agreements with the federal governments that expressly reserves authority to enforce its state criminal laws on federal installations.¹⁴⁰

Proprietary interests are the opposite of exclusive jurisdictions in that the state retains full authority over the tract of land and the federal government is merely a leaseholder or has purchased a right to use the land from the state. Thus, these areas are much like all other lands within sole state control. Therefore, state civil and criminal laws fully apply to the military installation insofar as federal supremacy issues do not preempt them.¹⁴¹

In all four examples of legislative jurisdictions, several reported cases necessarily launch into a detailed examination of government contracts, land deeds, survey maps, and related documents in order to determine the exact type of legislative jurisdiction that applies to each tract of land. Although most cases are tedious and involve contractual claims, some of them have involved murder or other criminal charges, all of which turned upon whether the tract of land was part of an exclusive legislative jurisdiction.¹⁴² This technical process has been the decisive factor in a number of lawsuits concerning parties located within a military installation.

¹³⁸ 18 USC §3 (2001).

¹³⁹ AR 405-20 *supra* note 135 at para. 4b.

¹⁴⁰ JA-221, *supra* note 136, ch. 2 at 58-59.

¹⁴¹ *Id.* ch.2 at 60.

¹⁴² See *e.g.*, *Holt v. United States* 218 U.S. 245 (1910) (involving the use of maps to demonstrate that the alleged murder took place in a barracks on a federal exclusive legislative jurisdiction); *Krull v. United States* 240 F.2d 122 (5th Cir. 1957) (using title documents and official records to prove the site of alleged offense occurred in exclusive legislative jurisdiction portions of National Military Park in Georgia).

B. Federal Supremacy

Regardless of the type of legislative jurisdiction, federal supremacy concerns are always looming for legal cases surrounding activities occurring on military bases or acts committed by service members. Generally stated, the federal supremacy doctrine can insulate military installations, military activities, and military officials acting within the scope of their official duties regardless of the form of legislative jurisdiction related to the situation.¹⁴³ Thus, under this doctrine, federal interests preempt conflicting state laws or regulations if they interfere with a federal function.

The source of the federal supremacy doctrine is the supremacy clause of the Constitution.¹⁴⁴ The landmark decision of *McCulloch v. Maryland*¹⁴⁵ first applied this notion when it held that a state law that required the federal bank to issue notes on paper that must be purchased from the state agency or pay a tax was unconstitutional. This expansive doctrine preempts state laws in a wide variety of areas. For example, the doctrine has been invoked to prevent states from taxing federal land,¹⁴⁶ from condemning federal land,¹⁴⁷ from enforcing wildlife gaming laws,¹⁴⁸ from requiring compliance with local building and zoning codes,¹⁴⁹ and from requiring federal government contractors to be licensed with the state.¹⁵⁰

In providing a federal shield for military officials acting within the scope of their duties, the protection afforded by the supremacy doctrine can often be quite broad even in the face of generally applicable state laws. One of the most cited cases is *In Re Neagle*¹⁵¹ where, in an odd set of events, a California state judge physically attacked Supreme Court Justice Field and was killed by a deputy US marshal serving as Justice Field's bodyguard. The State of California attempted to prosecute the marshal for murder. However, the Supreme Court affirmed the approval of a federal habeas petition by Neagle because it found that the marshal, who was acting within the scope of his duties pursuant to federal law,

¹⁴³ JA-221, *supra* note 136, ch.2 at 197-217.

¹⁴⁴ U.S. Const. art. VI, cl. 2.

¹⁴⁵ 17 U.S. (4 Wheat.) 316 (1819).

¹⁴⁶ See e.g., *Wisconsin Central R.R. v. Price County*, 133 U.S. 496, 504 (1890); *Van Brocklin v. Tennessee*, 117 U.S. 151, 176 (1886); *United States v. Woodworth*, 170 F.2d 1019 (2d Cir. 1948).

¹⁴⁷ See e.g., *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917); *Minnesota v. United States*, 305 U.S. 382, 386-87 (1939).

¹⁴⁸ *Hunt v. United States*, 278 U.S. 96 (1928).

¹⁴⁹ See e.g., *United States v. City of Chester*, 144 F.2d 415 (3d Cir. 1944); *United States v. Philadelphia*, 56 F. Supp. 862 (E.D. Pa. 1944).

¹⁵⁰ *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

¹⁵¹ 135 U.S. 1 (1890). See also *Johnson v. Maryland*, 254 U.S. 51 (1920) (overriding state law requiring that a postal employee have a state driver's license when in the official performance of his federal duties).

could not be subjected to the state law. More recently, in *People of New York v. Miller*,¹⁵² a soldier who had killed a civilian while operating a military vehicle had neither a military nor civilian driver's license. The soldier had his case removed to federal court via 28 USC §1442(a)(1).¹⁵³ The court dismissed the state criminal charge based upon the soldier's lack of a driver's license by holding that this was purely a federal concern.¹⁵⁴ In another example, the Army Judge Advocate General invoked this doctrine when he advised that Army personnel could enter private property, off base, to examine, secure, or remove downed aircraft regardless of state laws that would prohibit trespass onto private property.¹⁵⁵

However, there is a limit to this broad blanket of immunity for military officials. If a military official is not acting within the scope of his or her official duties and then fails to abide by state laws, no immunity will be granted.¹⁵⁶ Furthermore, the grant of immunity will depend upon the scope and authority of the directives, rules, or regulations under which the military official is acting. For instance, directives such as the Standing Rules of Engagement (SROE) used to apply to all military operations both foreign and domestic.¹⁵⁷ As of January 2000, those rules were altered to apply only to operations outside the United States or in times of military attack.¹⁵⁸ Furthermore, as a directive, and not a regulation, the SROE is not perceived as having the force of law.¹⁵⁹ Thus, as one writer notes, a soldier protecting a convoy of military equipment on a state highway would not be authorized to use deadly force in accordance with the SROE and expect to be granted official immunity.¹⁶⁰ Thus, it is too simplistic and overreaching to state that the supremacy doctrine would protect an official every time he or she perceived himself or herself to be acting within the scope of an official duty. The grant of immunity will certainly depend on the authoritative basis of the military guidance that controls the official's actions, how closely the official complied with the military guidance when the official acted, and the nature of the federal interests related to the official's activity.

¹⁵² No. 77-CR-26 (E.D.N.Y. 1977) (order of dismissal).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ DAJA-AL 1982/3084 (7 Dec. 1982), digested in 1983 ARMY LAW 29-30 (Nov. 1983).

¹⁵⁶ See JA-221, *supra* note 136, ch.2 at 208.

¹⁵⁷ See Lieutenant Colonel W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, 2000 ARMY LAW 1 (Nov. 2000).

¹⁵⁸ *Id.* at 3-4.

¹⁵⁹ *Id.* at n.19.

¹⁶⁰ *Id.*

VI. A Confession to the Chaplain: The Chaplain's Obligations with Respect to Privileged Communications Concerning Child Abuse or Molestation

A. The Hypothetical Situation¹⁶¹

One afternoon, Petty Officer Second Class Smith visits with Chaplain (Lieutenant) Roberts at his offices at the Chapel of Hope located on a small military base in the continental United States.¹⁶² Petty Officer Smith made the appointment because he felt deeply troubled and needed someone to speak with. Chaplain Roberts, a Jewish rabbi, has served for over four years and counseled numerous service members.

In the chaplain's office, behind closed doors, Petty Officer Smith sits down with the chaplain and says, "Chaplain, I am a Catholic and there are sins that I am committing. It's really killing me and I want to get it off my chest. Can we keep this between you and me?"

Chaplain Roberts replies, "Go ahead, you can tell me, what is troubling you?" At this point, Smith tells the chaplain that he has been molesting his four-year old stepdaughter for the past six months since he married the girl's mother. His wife does not know of his activities and he has been feeling an overwhelming amount of shame, grief, and embarrassment over his actions. However, he lacks self-control and cannot stop.

B. A Framework to Evaluate the Situation

Once Chaplain Roberts becomes aware of Petty Officer Smith's activities, this chaplain enters the center of important legal questions regarding what the chaplain does regarding the penitent-clergy privilege. The following framework may be helpful for a chaplain's legal advisor to consider when dealing with privileged communications concerning child abuse:

¹⁶¹ All facts contained herein are purely fictitious.

¹⁶² The scope of this Note's hypothetical is purposefully limited to domestic bases. Whether and to what extent a foreign nation's child abuse reporting laws, if any, apply is not explored here.

- (1) Determine if the communication is privileged.
- (2) If it is not privileged, then the chaplain should not maintain the communication as confidential and should follow the guidance of the respective military Family Advocacy Program, which in turn requires the reporting of such situations.
- (3) However, if it is privileged, then consider the following:
 - (a) Evaluate the state mandatory reporting laws where the base is located, the form of legislative jurisdiction granted to the base, and issues of federal supremacy.
 - (b) Evaluate the personal, moral, professional, and religious faith concerns that face the chaplain and consider alternatives that would avoid criminal liability under the state reporting law but would properly address the chaplain's moral, religious, or personal concerns.

C. Application of the Framework

1. Was the Communication Privileged?

Yes. As explained in Part II, the only basis of determining whether a military penitent-clergy communication is privileged is MRE 503. In this case, the communication would have to satisfy MRE 503's three-part test as demonstrated in *Moreno*.¹⁶³ First, Petty Officer Smith's statements were made at least as a matter of conscience if not a formal act of religion. Second, he made those statements to Chaplain Roberts who was acting in his capacity as a member of clergy. Finally, Petty Officer Smith's request to keep the matter between them, the chaplain's implied assertion that Smith was free to speak, the fact that the meeting was behind closed doors and without the presence of third parties, are factors that can reasonably be interpreted to show that Smith's statements were meant to be confidential.

2. If Privileged, What Does the Chaplain Consider?

From a purely legal standpoint, discounting personal, moral, and religious objections, Chaplain Roberts should *never* divulge a communication that is deemed privileged. In almost all situations, he will avoid criminal liability. However, a clash between federal and state laws might pit Chaplain Roberts as the

¹⁶³ See *supra* note 66 and accompanying text.

victim of a case of first impression. Under this special circumstance, the federal interests should trump state interests thus leading to the advice for the chaplain to remain silent.

This advice is based upon the conclusion that a chaplain acting within his or her official capacity is always under a duty by military regulations to keep privileged communications confidential.¹⁶⁴ Interestingly, while MRE 503 provides the basis for defining what is privileged, it is the military regulation that applies with the force of law to bind the chaplain to silence.¹⁶⁵

In most cases, state law will not conflict with the military regulations governing the chaplain and that would end the inquiry. However, in some cases where the base is located within a state that applies mandatory reporting laws to clergy, and where the base is not an exclusive legislative jurisdiction, then a conflict between state criminal law and a federal military regulation would occur.

a. The State's Mandatory Reporting Law, the Base's Legislative Jurisdictional Status, and Federal Supremacy Issues

The item to look to first is the state mandatory reporting law where the domestic installation is located. In twenty-one states, such as South Carolina, clergy are under no duty to report suspected child abuse.¹⁶⁶ In these states, Chaplain Roberts, although still influenced by non-legal factors (personal, moral, religious), would simply be legally guided by military regulations. However, in twenty-nine states¹⁶⁷ such as Rhode Island, that have included clergy to relative degrees, as being liable under the mandatory reporting laws, a further question needs to be asked. Chaplain Roberts' legal advisor will need to determine if the statute applies based upon the chaplain's religious affiliation or the manner in which the privileged communication took place. For instance, some states, such as Delaware, Idaho, or Utah, hold clergy liable under mandatory reporting laws but narrowly create an exception for communications held during sacramental confessions.¹⁶⁸ For instance, Chaplain Roberts, a Jewish rabbi would not be exempt if he was stationed at a base in Delaware, because he does not exercise the Catholic sacrament of confession.

If state mandatory laws potentially apply to the chaplain, then the legal advisor must examine the legislative jurisdiction granted to the installation. This

¹⁶⁴ See *supra* notes 88-90 and accompanying text.

¹⁶⁵ *Id.*

¹⁶⁶ See *supra* note 123 and accompanying text.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

is not necessarily an easy question to answer. As noted in Part IV, this may become a laborious task of examining charts, maps, and documents to determine the form of legislative jurisdiction. The installation's Staff Judge Advocate will have to research the issue of legislative jurisdiction or in the cases of non-exclusive jurisdictions, may have to review possible Memorandum of Understandings/Agreements that have been signed by local and base officials.

If the base is an exclusive jurisdiction, then the state criminal laws would not apply except for those enforced by federal prosecutors through the ACA.¹⁶⁹ In this case, the argument can be made that the state mandatory reporting laws for clergy are in conflict with the military and federal interests for chaplains to maintain silence. Thus, under the ACA it seems unlikely that the federal government would enforce the conflicting state misdemeanor criminal statute.

If the base is a concurrent legislative jurisdiction, partial legislative jurisdiction, or proprietary interest then the state law can be enforced on the installation.¹⁷⁰ Thus, in a state where clergy are mandated to report suspected child abuse and where the base is not an exclusive legislative jurisdiction, the attempted prosecution of Chaplain Roberts would be a valid case of first impression.

In this case, the chaplain and the legal advisor should attempt to invoke the federal supremacy doctrine. In doing so, it is highly likely that Chaplain Roberts would have the case removed to the local federal district court and could petition the Department of Justice to represent him in the matter. Where federal interests are importantly implicated, the Department of Justice will represent a government official in this type of case.¹⁷¹

Once in federal court, Chaplain Roberts' legal team could move to dismiss the charges under the supremacy doctrine.¹⁷² Therefore, the chaplain would have to establish that he or she was acting within the scope of official military duties mandated by federal law, implicating federal interests that override state interests. Defining whether the chaplain acted properly centers on three main arguments.

First, Chaplain Roberts' attorneys would have to argue that his consultations with Petty Officer Smith were certainly within his official duties as a Navy chaplain operating at a military chapel on a base. Second, the chaplain's attorneys would have to establish that the pertinent military regulations mandating silence have the force of law that provide the proper basis for the official duty that

¹⁶⁹ See *supra* note 138 and accompanying text.

¹⁷⁰ See *supra* note 139-41 and accompanying text.

¹⁷¹ 28 U.S.C. §1442(a)(1) (2000). See also JA-221, *supra* note 136, n.505.

¹⁷² *Id.*

the chaplain was acting in compliance with. Finally, Chaplain Roberts' attorney would implore the court to recognize the concept explained in *Isham*, that to undo the absolute nature of penitent-clergy communications would "largely destroy the effectiveness of members of the Chaplain Corps. Navy chaplains play a vital role in carrying out the mission of the Navy and Marine Corps."¹⁷³

On the first element of the supremacy claim it should be easily established he was acting in the capacity of a government official. However, on the second point, i.e. whether the military regulations mandating his silence would be read as having the force of law or even being read to mandate absolute silence could be attacked by the prosecuting state. For example, as discussed in Part II, the Navy's military regulations are not as explicit or detailed as the Army or Air Force in addressing the duties of the chaplain to maintain silence.¹⁷⁴ However, Chaplain Roberts could point to the reporting exception in the Navy's Family Advocacy Program, and Navy and Marine Corps Court of Military Appeals' interpretation of the "absolute" privilege from *Isham* to argue that Navy regulations intended to mandate his silence.¹⁷⁵ Furthermore, it is not clear whether the Navy regulations similar to the Army Regulation 165 discussed by the court in *Benner* actually carry a punitive element for non-compliance. The state may argue that without this punitive remedy for non-compliance, that the regulation does not carry with it the force of law necessary to shield the military official purportedly acting in compliance with this duty.¹⁷⁶

The final argument related to the supremacy doctrine would involve a weighing of competing interests between federal interests in the military's morale as influenced by the Chaplain Corps and its protection of privileged communications.¹⁷⁷ However, the state also would argue that it should have the final say regarding highly important domestic interests in preventing child abuse that would allow them to override a military regulation in this instance.¹⁷⁸ Due to

¹⁷³ *Isham* 48 M.J. at 606.

¹⁷⁴ See *supra* note 91 and accompanying text.

¹⁷⁵ See *supra* note 93 and accompanying text.

¹⁷⁶ See *supra* notes 158-161 and accompanying text.

¹⁷⁷ See Major Tom Doyle, Ch, USAF, *Privileged Communications with Air Force Chaplains: Preserving the Absolute Nature of the Privilege*, Leading Edge (June 14, 2002), at http://www.usafhc.af.mil/attachments/leadingedge/june_02/Preserving_Privileged_Comm.rtf. (providing one of the best arguments representing the viewpoint of the Chaplain Corps by stating, "The credibility and stature enjoyed by . . . chaplains is due. . . to the fact that military members can expect absolute confidentiality. . . . The mission is served because commanders and subordinates alike know that there is one place they can go to in times of trouble and be assured of confidentiality.").

¹⁷⁸ For a compelling argument that state interests in domestic violence laws should override federal interests see Michael J. Malinowski, *Federal Enclaves and Local Law: Carving out a Domestic Violence Exception to Exclusive Legislative Jurisdiction*, 100 YALE L.J. 189 (1990). However, this argument rested mainly on the fact that military FAP goals were consistent with state agency's goals in preventing domestic abuse. Whereas, here, the FAP has a specific reporting exception which would be

the strong interests at stake – military morale engendered by a Chaplain Corps entrusted with absolute confidentiality versus the prevention of rampant child abuse and molestation – neither side has a overwhelming advantage in this particular argument.

Furthermore, certain factors undercut both the federal and state arguments in this case giving both sides fodder to make equally compelling arguments. In support of the state's attempt to lessen the importance of the federal interest, the military regulation regarding privileged communications between penitent and clergy has never been reported to have been formally enforced against a military chaplain. Furthermore, in measuring exactly how strong the federal interest is, one can analyze the military regulations that require silence. Indeed, in *Benner*, the military chaplain violated Army Regulations concerning confidentiality of privileged communications and suffered no reportable sanctions.¹⁷⁹ In other words, if the military regulation does not carry any specific punishment and if opinion letters such as the 1996 Air Force letter seem to implore chaplains to maintain silence consistent with a decision that, “must rest within the conscience of the individual chaplain, under the tenants of his particular religion, pursuant to guidance from the Chaplain's service, and after a balancing of religious tenants against the instant harm,”¹⁸⁰ then an argument can be made that the federal interest is not so strong after all.

However, there are relatively few states that have demonstrated a strong interest in completely abrogating the penitent-clergy privilege in deference to protecting against child abuse and molestation. Only five states¹⁸¹ have gone as far to completely abrogate the privilege. Admittedly twenty-nine states, in total, name clergy as mandated reporters but sixteen of them have carved out narrow exceptions for pastoral communications. Furthermore, mandatory reporting statutes as applied to clergy have been assailed by scholars as a violation of the freedom of the expression of religion clause of the First Amendment.¹⁸²

Although reasonable minds can differ on this final point, it appears that the past case law regarding the supremacy doctrine in military-related matters is the decisive factor in concluding that the court would likely favor Chaplain Roberts on the supremacy claim. Examples of cases discussed in Part IV

in contrast to the federal interest in maintaining a Chaplain Corps that is viewed as open line of communication.

¹⁷⁹ *Benner*, 55 M.J. at 625 (stating, “[w]e find that ARs 165-1 and 608-18 do not expressly provide for any remedy for failure to comply with their provisions....”).

¹⁸⁰ See *supra* note 101 and accompanying text.

¹⁸¹ See *supra* note 123.

¹⁸² Indeed, many scholars argue that states that abrogate the penitent-clergy privilege and force clergy to be mandatory reporters violates the freedom of the expression of religion clause of the First Amendment. See generally *e.g.*, BUSH & TIEMANN, *supra* note 2; Mitchell, *supra* note 8.

demonstrate that courts are reluctant to second-guess military interests when they conflict with state law. Especially in this case where states are conflicted with whether they should apply these reporting laws against clergy and do not raise a strong claim to overcome the presumption of federal supremacy, it appears that Chaplain Roberts' case would be dismissed. However, without having tested this theory in an actual case, both chaplains and staff judge advocates should be aware of the moderate legal risk that this situation can present. Perhaps, as explored in the next subsection, a non-legal remedy will ultimately prove to be the best solution for chaplain confronted with this situation.

b. Personal, Moral, Professional, and Religious Concerns:
Consider Alternative Solutions While Avoiding
Liability

As briefly mentioned in Part II, Chaplain Roberts will most likely be influenced by his own personal, moral, professional, and religious concerns before he begins to realize the possible legal ramifications. On a personal and moral level, Chaplain Roberts will want to take steps to do whatever he can to stop the abuse. From a professional level, he will be reminded of the conflicting guidance from the Codes of Conduct for Chaplains that steadfastly supports maintaining all privileged communications confidential.¹⁸³ However, as a Jewish rabbi, it is likely that Chaplain Roberts will feel compelled to report the abuse according to the tenets of his faith.¹⁸⁴ Just imagine inserting another chaplain of a different faith or personal background into this hypothetical. For example, a Catholic priest hears the sacrament of confession from Petty Officer Smith and is under a duty to maintain the Seal of Confession inviolate. Or a married Methodist minister who has a young daughter hears of these awful events.

As one can see, the competing factors weighing upon a military chaplain is as varied and individualized as the number of chaplains in the Corps. Yet, the military's privilege, as construed by the courts, provides very little legal room to maneuver. The military's penitent-clergy privilege is *absolute*. It is easy to apply yet with no ability to make an exception for any of hypothetical chaplains listed above.

Where there is no legal room to maneuver, practical alternative solutions should be explored to alleviate some of the pressure felt by chaplains. First, the most likely alternative, as suggested by the military FAP is for chaplains to encourage service members to self-report their situations. In essence, the hope is that chaplains can be an open path for a conflicted service member to call for help knowing that anything reported to the chaplain will always be held private. Then,

¹⁸³ See *supra* note 108 and accompanying text.

¹⁸⁴ See *supra* note 115 and accompanying text.

the chaplain can have the unique opportunity to counsel the individual in order to get the person to respond in a positive manner. However, some would argue that this alternative and encouragement to push self-reporting intrudes upon the chaplain's duty to maintain confidences and be an open channel of communication. If it appears to a service member that although a chaplain is bound to silence, that the chaplain will be putting enormous pressure upon the service member to report themselves it could cut off chaplains as perceived conduits of unrestricted communication.

Another alternative that would possibly raise ethical questions but is certainly within the letters of the military regulations would be for a chaplain to lay out "ground rules" before initiating privileged communications. For example, Chaplain Roberts could have responded to Petty Officer Smith's request of keeping it "between you and me" by saying, "Petty Officer Smith, before you go on, I want to let you know that my religious faith instructs me to report any domestic abuse or anything that would prevent the further commission of a crime. As long as you understand that, then you know that I will hold anything else you say to me in confidence EXCEPT for those items I just mentioned. Now, what did you want to tell me?"

MRE 503, as applied by the courts provides the ability for chaplains to set ground rules. As in *Isham*, the battalion chaplain laid out the ground rules to the Marine by telling him that he would report anything that would be harmful to the members of the battalion, any thoughts of suicide, or any events of *domestic abuse*.¹⁸⁵ Thus, the chaplain did not violate the privilege when he obtained treatment for Isham. Furthermore, the *Isham* court implicitly approved of this method by accepting the terms of the "ground rules" when they excluded the statements from court while recognizing the legitimate actions of the chaplain to report it for safety purposes. The main ethical concern that this possibly raises is that certain chaplains could effectively abuse this mechanism to foreclose him or herself as an open channel by which military members can communicate.

Whatever the drawbacks of the alternatives proposed, it seems as the most effective alleviation to the application of a broad and rigid rule to all chaplains while enjoying the absolute rule's largest advantage: engendering the morale of the nation's military members by being open lines of communication bound by strict codes of confidentiality.

VII. Conclusion

¹⁸⁵ *Isham*, 48 M.J. at 604.

This goal of this Note was to provide a background on the military's penitent-clergy privilege. It also identified the competing legal, moral, and ethical considerations that confront the chaplain when faced with possibly conflicting state child abuse mandatory reporting laws. It offered a framework for chaplains and judge advocates that may help them identify when a conflict exists and suggests possible methods to settle this conflict.

Finally, this Note's answer to the posed question should make two things clear: 1) military chaplains have a legal obligation to maintain the confidentiality of privileged communications under *all* circumstances, civilian or military, in court or out of court; and 2) that military chaplains are likely to prevail in dismissing any attempt by a state to prosecute him or her under state child abuse reporting laws. However, the chaplain and judge advocate must be aware that arriving at this conclusion necessarily involves a complicated analysis of jurisdictional and federal supremacy clause issues and that there are alternative non-legal recourses that can help to resolve the turmoil that the chaplain must deal with. It is with this heightened awareness of the possible conflicts between federal and state laws that judge advocates can effectively support military chaplains as they serve as the "patient, sympathetic laborers with the crew, day in, day out, and through many a night" who contribute "immeasurably to the moral courage" of our fighting men and women.¹⁸⁶

¹⁸⁶ See *supra* note 1.

Appendix A

Source: Child Abuse and Neglect State Statutes Series, Ready Reference, Reporting Laws: Clergy as Mandated Reporters, National Clearinghouse on Child Abuse and Neglect Information (2002) *available at* <http://www.calib.com/nccanch/pubs/readref/mandclergy.pdf>

	Privilege granted but limited to “pastoral communications”	Privilege denied in cases of suspected child abuse or neglect	Privilege not addressed in the reporting laws
Clergy enumerated as mandated reporters	Arizona, California, Maine, Minnesota, Montana, Nevada, North Dakota, Oregon, Pennsylvania	New Hampshire, West Virginia	Connecticut, Mississippi
Clergy not enumerated as mandated reporters but may be included with “any person” designation	Delaware, Florida, Idaho, Kentucky, Maryland, Utah, Wyoming	North Carolina, Rhode Island, Texas	Indiana, Nebraska, New Jersey, New Mexico, Oklahoma, Tennessee
Neither clergy nor “any person” enumerated as mandated reporters	Louisiana, Missouri, South Carolina, Washington	Not applicable	Alabama, Alaska, Arkansas, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Massachusetts, Michigan, New York, Ohio, South Dakota, Vermont, Virginia, Wisconsin

ECO-JUSTICE AND THE MILITARY IN INDIAN COUNTRY: *THE SYNERGY BETWEEN ENVIRONMENTAL JUSTICE AND THE FEDERAL TRUST DOCTRINE*

LCDR William J. Dunaway, JAGC, USN*

I. Introduction

Whether on land, in the air, or at sea, no other organization can match the size or scope of today's military.¹ The Department of Defense (DoD) manages the world's largest infrastructure, with a physical plant valued at over half a trillion dollars.² DoD employees are located on 588 fixed facilities and more than 40,000 properties amounting to 18 million acres of land, including 250 major

* Lieutenant Commander William J. Dunaway, Judge Advocate General's Corps, United States Navy (B.S.C.S., University of Mississippi, May 1986; J.D., University of Mississippi, May 1992; LL.M., The George Washington University Law School, May 2002) This article is adopted from the author's LL.M. thesis. LCDR Dunaway is currently assigned as an Environmental Counsel to the Commander, U. S. Atlantic Fleet. Prior to reporting to graduate school, LCDR Dunaway completed a tour on the bench as the Military Judge, Southeast Judicial Circuit, Navy-Marine Corps Trial Judiciary.

¹ Department of Defense 101, available at <http://www.defenselink.mil/pubs/dod101/> { TA \l "http://www.defenselink.mil/pubs/dod101/" \s "http://www.defenselink.mil/pubs/dod101/" \c 11 } As a Comparison:

Company	Budget/Revenue*	Employees*	Bases/Plants*
DoD	\$270 billion	2,043,000	588
Exxon/Mobil	165 billion	123,000	117
Ford	163 billion	345,000	183
GM	144 billion	388,000	358
GE	112 billion	340,000	350
* 1999 Fortune 500 & corporate data			

² Department of Defense, Report of the Secretary of Defense to The President and the Congress 2000 (U.S. Government Printing Office, 2000) { TA \l "Department of Defense, Report of the Secretary of Defense to The President and the Congress 2000 (U.S. Government Printing Office, 2000)" \s "Department of Defense, Report of the Secretary of Defense to The President and the Congress 2000 (U.S. Government Printing Office, 2000)" \c 10 }.

installations.³ Those employees operate some 250,000 vehicles, from trucks to tanks, and maintain a fleet of over 15,000 aircraft and more than 1,000 oceangoing vessels, ranging from aircraft carriers to landing craft. Additionally, DoD operates 550 public utility systems.⁴ In fiscal year 1999, DoD spent \$2.1 billion on environmental quality program activities with eighty-three percent of this amount going toward fulfilling compliance requirements.⁵ As an example, in carrying out its environmental compliance duties, DoD currently holds more than 1,100 National Pollutant Discharge Elimination System (NPDES) permits for approximately 1,900 activities and systems, including domestic and industrial wastewater treatment plants and storm water treatment systems.⁶ Each of these permits requires state, tribal, or United States Environmental Protection Agency (EPA) approval, and without the permits there could be no discharge.⁷ For the military, operating within the environmental statutory and regulatory requirements is not only the law, it is mission essential.⁸

An integral part of that environmental mission is the responsibility the military has to achieve environmental justice "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations...."⁹ In order to achieve this goal, DoD is committed to infusing an ethic of environmental justice throughout its day to day operations and activities.¹⁰ This mandate is implemented throughout the military as an integrated part of the National Environmental Policy Act (NEPA) planning process.¹¹ In order to infuse such an ethic of environmental justice throughout its day-to-day operations and activities, the local military commander must understand how environmental justice may affect a proposed federal action. Once understood,

³ Department of Defense 101, available at <http://www.defenselink.mil/pubs/dod101/largest.html>{ TA \l "http://www.defenselink.mil/pubs/dod101/largest.html" \s "http://www.defenselink.mil/pubs/dod101/largest.html" \c 11 }

⁴ *Id.*

⁵ Department of Defense, FY 1999 ANNUAL REPORT TO CONGRESS: DEFENSE ENVIRONMENTAL QUALITY PROGRAM, Appendix H, available at <https://www.denix.osd.mil/denix/Public/News/OSD/EQ99/cover.html> [hereinafter 1999 DEQ REPORT] (last visited April 22, 2002){ TA \l "Department of Defense, FY 1999 ANNUAL REPORT TO CONGRESS: DEFENSE ENVIRONMENTAL QUALITY PROGRAM" \s "1999 DEQ Report" \c 10 }

⁶ *Id.* at 14.

⁷ Federal Water Pollution Control Act, §402, codified at 33 U.S.C. §101-607.{ TA \l "Water Pollution Control Act, codified at 33 U.S.C. §101-607." \s "Federal Water Pollution Control Act, codified at 33 U.S.C. §101-607." \c 2 }

⁸ 1999 DEQ Report{ TA \s "1999 DEQ Report" }, *supra* note 5.

⁹ *Id.*{ TA \s "EO 12898" }

¹⁰ Department of Defense, *Strategy on Environmental Justice*, March 24, 1995, at Implementation Goal 1, available at <https://www.denix.osd.mil/denix/Public/Library/Planning/Justice/note7.html> [hereinafter DoD EJ Strategy] (last visited April 22, 2002){ TA \l "Department of Defense, *Strategy on Environmental Justice*, March 24, 1995" \s "DoD EJ Strategy" \c 8 }

¹¹ National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §4321 et. seq.{ TA \l "National Environmental Policy Act of 1969, 42 U.S.C. §4321 et. seq." \s "42 U.S.C. §4321" \c 2 }

integrating the concept of environmental justice into the NEPA planning process is not simply another procedural check-in-the-box. Opponents of a proposed federal action are increasingly relying upon environmental justice issues to create legal hurdles that can be serious obstacles to mission accomplishment.¹²

In implementing environmental justice, the military must evaluate the impact of its operations on American Indian and Alaska Native governments.¹³ Since before World War II, many DoD activities, including weapons testing, practice bombing, and field maneuvers, have affected Indian lands.¹⁴ Of course, DoD's "activities" affecting American Indians have deeper roots than this current generation. An understanding and appreciation of those roots is essential to any meaningful consultation between the military and potentially affected tribes under the federal trust doctrine.

The federal trust doctrine is an often ambiguously stated concept that seeks to define the duty owed tribal governments by the United States. This relationship includes a mixture of legal duties, moral obligations, and assumptions that apply to the interpretation of statutes and treaties.¹⁵ The doctrine's champions hail it as procedural and substantive law requiring a fiduciary relationship in all federal agency dealings potentially affecting tribal lands or tribal rights.¹⁶ Under certain circumstances, courts have agreed and indicated that the relationship owed approximates a trusteeship, with the United States serving as the trustee and

¹² { TA \l "ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE & ENFORCEMENT (Environmental Law Institute, 2001)" \s "REITZE" \c 10 }ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE & ENFORCEMENT (Environmental Law Institute, 2001) at 616.

¹³ Collectively referred to as "tribes" as defined by the most current Department of Interior/ Bureau of Indian Affairs list of tribal entities published in the Federal Register per §104 of the Federally Recognized Indian Tribe List Act. { TA \l "Department of Defense, Office of the Deputy Under Secretary of Defense For Installations and Environment (DUSD(I&E)), *American Indian and Alaska Native Policy*, October 20, 1998" \s "DoD Indian Policy" \c 8 }Department of Defense, Office of the Deputy Under Secretary of Defense For Installations and Environment (DUSD(I&E)), *American Indian and Alaska Native Policy* (October 20, 1998) at fn 1, available at <https://www.denix.osd.mil/denix/Public/Native/Outreach/policy.html> [hereinafter *DoD Indian Policy*] (last visited April 22, 2002).{ TA \s "DoD Indian Policy" }

¹⁴ 1999 DEQ Report{ TA \s "1999 DEQ Report" }, *supra* note 5, at 43.

¹⁵ Harry R. Bader And Greg Finstad, *Conflicts Between Livestock And Wildlife: An Analysis Of Legal Liabilities Arising From Reindeer And Caribou Competition On The Seward Peninsula Of Western Alaska*, 31 ENVTL. L. 549 (Summer, 2001){ TA \l "Harry R. Bader And Greg Finstad, *Conflicts Between Livestock And Wildlife: An Analysis Of Legal Liabilities Arising From Reindeer And Caribou Competition On The Seward Peninsula Of Western Alaska*, 31 ENVTL. L. 549 (Summer, 2001)" \s "Harry R. Bader And Greg Finstad" \c 10 }.

¹⁶ Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L REV. 109, 117-21 (1995).{ TA \l "Mary Christina Wood, *Protecting the Attributes Of Native Sovereignty: A New Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L REV. 109 (1995)" \s "Wood" \c 10 }

Native Americans as the beneficiaries.¹⁷ However, the extent of the duty owed Native Americans by federal agencies, like DoD (whose mission is not Indian policy or tribal lands administration) is not as exacting and may only involve a duty to "balance trust responsibilities with their normal [mission]."¹⁸ Policies within federal agencies typically define the scope of the agency's obligation to Native Americans based on agency interpretation of its responsibilities under the federal trust doctrine.¹⁹ Despite the different interpretations of the federal trust doctrine, it is indisputable that Native Americans have long embraced the doctrine as a critical component of their status as a people and a government apart. The federal trust doctrine stands as the historic and legal legacy of centuries of jurisprudence.

Although a relatively new legal concept, Native Americans are increasingly embracing environmental justice.²⁰ This is not surprising considering environmental justice promises "equal protection from ecological harms, fair access to natural resources for all, greater corporate and military responsibility, better health care availability, and community involvement in environmental decision making."²¹ There is, however, a danger for Native Americans in their

¹⁷ *United States v. Mitchell*, 463 U.S. 206 (1983){ TA \l "United States v. Mitchell, 463 U.S. 206 (1983)" \s "United States v. Mitchell" \c 1 }{ TA \s "United States v. Mitchell" } (comprehensive statutes and regulations giving federal government responsibility to manage Indian resources and property established a fiduciary relationship); *f* TA \l "Morton v. Mancari, 417 U.S. 535 (1974)" \s "Morton v. Mancari" \c 1 }*Morton v. Mancari*, 417 U.S. 535 (1974)(Native American hiring preference in BIA did not violate the Equal Protections Clause); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903){ TA \l "Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)" \s "Lone Wolf v. Hitchcock" \c 1 }(Agency has a duty of protection to the Indian Tribes arising from the power the federal government exercises over Tribal property).

¹⁸ *Lincoln v. Vigil*, 508 U.S. 182, 194-95 (1993){ TA \l "Lincoln v. Vigil, 508 U.S. 182 (1993)" \s "Lincoln v. Vigil" \c 1 }trust relationship does not limit agency discretion to reorder its priorities from serving a subgroup to serving a broader class of Native Americans).

¹⁹ United States Environmental Protection Agency, National Environmental Justice Advisory Council (NEJAC), Indigenous Peoples Subcommittee, *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in the Environmental Decision Making*, November 15, 2000 [hereinafter NEJAC, *Guide on Consultation*]{ TA \l "United States Environmental Protection Agency, National Environmental Justice Advisory Council (NEJAC), Indigenous Peoples Subcommittee, *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in the Environmental Decision Making*, November 15, 2000" \s "NEJAC, Guide on Consultation" \c 10 }, Addendum B, available at <http://es.epa.gov/oeca/main/ej/fgconsult.html> (last visited April 22, 2002).{ TA \l "http://es.epa.gov/oeca/main/ej/fgconsult.html." \s "http://es.epa.gov/oeca/main/ej/fgconsult.html." \c 11 }

²⁰ Federal Interagency Working Group, AMERICAN INDIAN & ALASKAN NATIVE ENVIRONMENTAL JUSTICE ROUNDTABLE, FINAL REPORT, January 31, 2001 (edited by Environmental Biosciences Program, Medical University of South Carolina Press [hereinafter, Roundtable]).{ TA \l "Federal Interagency Working Group, AMERICAN INDIAN & ALASKAN NATIVE ENVIRONMENTAL JUSTICE ROUNDTABLE, FINAL REPORT, January 31, 2001 (edited by Environmental Biosciences Program, Medical University of South Carolina Press)." \s "Roundtable" \c 10 }

²¹ United Church of Christ Commission for Racial Justice, *Proceedings of the First National People of Color Environmental Leadership Summit*, xiii (1991){ TA \l "United Church of Christ Commission for

new embrace of environmental justice. That danger stems from the fact that in its current implementation by the military, environmental justice is the antithesis of the federal trust doctrine. While tribal governments and tribal members struggle to remain a government and a people apart, environmental justice forces federal agencies to treat them as just another special interest group.

This paper begins by addressing the evolving concept of environmental justice, to include its history and implementation within DoD. Next, it explores the United States' relationship and obligations to Indian tribes under the federal trust doctrine. A discussion of the impact of environmental justice on the military's policy towards Indian tribes follows. The discussion seeks to answer the question: "Does the implementation of environmental justice add to or subtract from the military's legal responsibilities towards Indian tribes?" The paper concludes with recommendations for policy changes that will further DoD's integration of environmental justice into the NEPA planning process without undermining the federal trust doctrine.

II. Environmental Justice

Environmental racism,²² environmental equity,²³ and environmental justice are concepts that evoke different meanings and strong reactions from diverse groups.²⁴ Despite the debate over definitions and causes, these concepts brought to the forefront of the environmental law community an awareness of the disproportionate burden imposed by environmental pollutants on certain segments of the population.²⁵ This point is emphasized by EPA's decision to make environmental justice one of its highest priorities over a decade ago.²⁶ The EPA

Racial Justice, *Proceedings of the First National People of Color Environmental Leadership Summit* (1991)" \s "Leadership Summit" \c 3 } Copies available from the United Church of Christ Commission for Racial Justice, 475 Riverside Dr. Suite 1950, New York, NY 10115.

²² Refers to those institutional rules, regulations, and policies or government or corporate decisions that deliberately target certain communities for least desirable land uses. It also encompasses the "systematic exclusion of people of color from environmental decisions affecting their communities." Bunyan Bryant, *Introduction* in ENVIRONMENT JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 5 (Bunyan Bryant ed. 1995){ TA \l "Bunyan Bryant, *Introduction* in ENVIRONMENT JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 5 (Bunyan Bryant ed. 1995)" \s "Bryant" \c 10 }.

²³ Refers to the equal protection of environmental laws, especially in siting and enforcement actions. *Id.*

²⁴ Beverly Wright, *Environmental Equity Justice Centers: A Response to Inequity*, in ENVIRONMENT JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 57 (Bunyan Bryant ed. 1995){ TA \l "Beverly Wright, *Environmental Equity Justice Centers: A Response to Inequity*, in ENVIRONMENT JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 57 (Bunyan Bryant ed. 1995)." \s "Wright" \c 10 }

²⁵ For a general discussion of these definitions as presented in the literature *see* REITZE, *supra* note 12{ TA \s "REITZE" } at §20-12.

²⁶ United States Environmental Protection Agency, Office of Environmental Justice (OEJ), ENVIRONMENTAL JUSTICE: 1996 ANNUAL REPORT, WORKING TOWARD SOLUTIONS, at Appendix III, available at <http://es.epa.gov/oeca/main/ej/index.html>{ TA \l "http://es.epa.gov/oeca/main/ej/index.html" \s "http://es.epa.gov/oeca/main/ej/index.html" \c 11 }

Administrator recently re-affirmed this commitment to environmental justice in a recent memorandum to senior staff.²⁷ Behind the official platitudes and speeches, federal agencies are still working to integrate environmental justice into their current operational mission.²⁸ In order to assess the military's success at implementing environmental justice, an understanding of the concept's historical roots is necessary.

A. Historic Development

1. Early Studies and EPA Response

Although the earliest case involving environmental equality reached the United States Supreme Court in 1886,²⁹ it was the President's Council on Environmental Quality (CEQ) which first acknowledged that racial discrimination adversely affected urban poor and the quality of their environment.³⁰ Despite this report, another sixteen years would pass before the issue received widespread national attention with the publication of the report of the Commission for Racial Justice of the United Church of Christ.³¹ The issues surrounding this "movement" were collected by Robert Bullard{ TA \l "ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (Westview Press, 1990)." \s "BULLARD" \c 10 } and published in 1990.³² His work became the first environmental justice textbook.³³ That same year, EPA established the

[hereinafter 1996 EJ REPORT]{ TA \l "United States Environmental Protection Agency, Office of Environmental Justice (OEJ), ENVIRONMENTAL JUSTICE: 1996 ANNUAL REPORT, WORKING TOWARD SOLUTIONS" \s "1996 EJ Report" \c 10 } (last visited April 22, 2002).

²⁷ Christine Todd Whitman, *EPA's Commitment to Environmental Justice*, Memorandum of August 9, 2001, available at <http://es.epa.gov/oeca/main/ej/index.html>{ TA \s "http://es.epa.gov/oeca/main/ej/index.html" } [hereinafter Whitman EJ Memo] (last visited April 22, 2002).{ TA \l "Christine Todd Whitman, *EPA's Commitment to Environmental Justice*, Memorandum of August 9, 2001" \s "Whitman EJ Memo" \c 8 }

²⁸ A current list of federal agencies with environmental justice policies on the Internet can be found at <http://es.epa.gov/oeca/main/ej/otherfa.html>{ TA \l "http://es.epa.gov/oeca/main/ej/otherfa.html" \s "http://es.epa.gov/oeca/main/ej/otherfa.html" \c 11 } (last visited April 22, 2002).

²⁹ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886){ TA \l "Yick Wo v. Hopkins, 118 U.S. 356 (1886)" \s "Yick Wo v. Hopkins" \c 1 }(zoning ordinance discriminated against plaintiff in violation of 14th Amendment).

³⁰ Council on Environmental Quality, Executive Office of the President, ANNUAL REPORT (1971){ TA \l "Council on Environmental Quality, Executive Office of the President, ANNUAL REPORT (1971)" \s "CEQ Annual Report (1971)." \c 10 }

³¹ United Church of Christ, Commission for Racial Justice, Toxic Wastes and Race: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites (New York: United Church of Christ, 1987){ TA \l "United Church of Christ, Commission for Racial Justice, Toxic Wastes and Race: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites (New York: United Church of Christ, 1987)" \s "UCC Report, 1987" \c 10 }

³² ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (Westview Press, 1990){ TA \s "BULLARD" }

³³ 1996 EJ Report{ TA \s "1996 EJ Report" }, *supra* note 26.

Environmental Equity Workgroup with a mandate to examine allegations that low-income and minority communities were suffering disproportionately high and adverse environmental and health effects.³⁴ The Workgroup's findings were published in 1992 as, *"Environmental Equity: Reducing the Risk for All Communities."*³⁵ In November 1992, EPA established its Office of Environmental Justice (OEJ) with an initial mission to conduct education and awareness programs.³⁶ This mission was expanded the following year when EPA charged the OEJ with the task of "developing and implementing a national platform for [Environmental Justice] action."³⁷ Simultaneously, EPA established the National Environmental Justice Advisory Council (NEJAC) located within the OEJ.³⁸ Stakeholders in the area of environmental justice constitute the NEJAC. The Council's formation and subsequent publications established EPA as the lead federal agency in the area of environmental justice.³⁹

The early debate concerning environmental justice centered on the central claim that minorities were disproportionately shouldering the weight of the nation's pollution through ever-increasing exposure to toxic waste sites and industrial polluters.⁴⁰ As social science data accumulated, it became increasingly clear that the original focus group (i.e., minorities) had to be expanded to include "low-income populations" since only then did a strong correlation exist to show a disproportionate impact.⁴¹ The literature is clear, however, that "economic status ...is correlated to race, and environmental laws may exacerbate the problems faced by the poor."⁴²

2. Executive Order 12898

The election of President William J. Clinton and Vice-President Albert Gore, Jr. in 1992 advanced the cause for environmental justice. Prior to the

³⁴ Melva J. Hayden, *A Perspective on the Environmental Protection Agency's Title VI and Environmental Justice Programs*, 10 FORDHAM ENVTL. LAW J. 359, 360 (1999).{ TA \l "Melva J. Hayden, *A Perspective on the Environmental Protection Agency's Title VI and Environmental Justice Programs*, 10 FORDHAM ENVTL. LAW J. 359 (1999)" \s "Hayden" \c 10 }

³⁵ *Id.*

³⁶ 1996 EJ REPORT{ TA \s "1996 EJ REPORT" }, *supra*, note 26, at iii. *See also*, United States Environmental Protection Agency, Office of Environmental Justice, *available at* <http://es.epa.gov/oeca/main/ej/index.html>{ TA \s "http://es.epa.gov/oeca/main/ej/index.html" } (last visited April 22, 2002).

³⁷ *Id.*

³⁸ Environmental Fact Sheet: National Environmental Justice Advisory Council (1999){ TA \l "Environmental Fact Sheet: National Environmental Justice Advisory Council (1999)" \s "Environmental Fact Sheet: National Environmental Justice Advisory Council (1999)" \c 3 }, *available at* <http://es.epa.gov/oeca/main/ej/index.html>{ TA \s "http://es.epa.gov/oeca/main/ej/index.html" } [hereinafter NEJAC Fact Sheet] (last visited April 22, 2002).

³⁹ 1996 EJ Report{ TA \s "1996 EJ Report" }, *supra* note 26, at 13.

⁴⁰ BULLARD{ TA \s "BULLARD" }, *supra* note 32.

⁴¹ REITZE{ TA \s "REITZE" }, *supra* note 12 at 616 and cases collected at footnotes 313 and 314.

⁴² *Id.*

election, then-Senator Gore saw his co-sponsored Environmental Justice Act of 1992 defeated in the Senate.⁴³ The bill was reintroduced in the House the following year by co-sponsor Representative John Lewis and also was defeated.⁴⁴ President Clinton responded on February 11, 1994 by issuing Executive Order 12898 entitled, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.⁴⁵ Executive Order 12898 has six sections. The first section requires every federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States [and its territories].”⁴⁶ The inclusion of “low-income populations” represented a significant step to dramatically expand the size of the protected class.⁴⁷ Section one also created an Interagency Working Group on Environmental Justice (IWG) headed by EPA, and required the development of agency-wide environmental justice strategies.⁴⁸ These strategies included the identification of programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment for revision.⁴⁹

The second section of the Executive Order directs agencies to ensure that their programs, policies, and activities do not have the effect of excluding, denying benefits to, or discriminating against persons and/or populations because of their race, color, or national origin.⁵⁰ The third section requires environmental health research to include minority and low-income populations as part of the data set examined by such research. Whenever practical and appropriate, this section also calls for environmental and human health risks data collection and analysis, especially for areas in close proximity to federal facilities.⁵¹ Information on race, national origin, income level, and other readily accessible and appropriate information must be collected, maintained, and analyzed for those populations living near federal facilities.⁵² This data is to be shared among federal agencies and with state, local, and tribal governments.⁵³

⁴³ S. 2806, 102d Cong., 2d Sess. (1992){ TA \l "Environmental Justice Act of 1992, S. 2806, 102d Cong., 2d Sess. (1992)" \s "S. 2806, 102d Cong., 2d Sess. (1992)" \c 2 }.

⁴⁴ H.R. 2105, 103d Cong., 1st Sess. (1993){ TA \l "Environmental Justice Act of 1992, H.R. 2105, 103d Cong., 1st Sess. (1993)" \s "H.R. 2105, 103d Cong., 1st Sess. (1993)." \c 2 }

⁴⁵ Exec. Order No. 12898 of February 11, 1994, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 3 C.F.R., 1994 Comp., p. 859.

⁴⁶ *Id.* at §1-101.

⁴⁷ REITZE{ TA \s "REITZE" }, *supra* note 12 at 618.

⁴⁸ Exec. Order No. 12898{ TA \s "EO 12898" }, *supra* note 45 at §1-102.

⁴⁹ *Id.* at §1-103(a).

⁵⁰ *Id.* at §2-2.

⁵¹ *Id.* at §3-302.

⁵² *Id.* at §3-302(c).

⁵³ *Id.* at §3-302(d).

Section four of the Executive Order tasks agencies with the responsibility to collect data and develop guidance for the health related risks associated with subsistence consumption of pollutant-bearing fish and wildlife.⁵⁴ Section five addresses public participation and access to information including the requirement that all public documents, notices, and hearings related to human health or the environment be concise, understandable, and readily accessible to the public.⁵⁵ Section six sets forth general provisions including specific application of environmental justice to Native American programs. Executive Order 12898 concludes with a limiting clause, stating the “order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.”⁵⁶

Accompanying Executive Order 12898 was a Presidential Memorandum that directed five specific actions.⁵⁷ Federal agencies shall: (1) ensure all programs and activities receiving federal financial assistance are non-discriminatory per Title VI of the Civil Rights Act of 1964; (2) incorporate an analysis of the environmental effects of federal actions on minority and low-income communities as part of NEPA; (3) provide opportunities for input and consultation with the potentially affected community regarding scope of the proposed federal action and mitigation issues; (4) submit proposed actions to EPA for review per Clean Air Act section 309, to ensure federal agencies have fulfilled their environmental justice responsibilities; and (5) ensure that the public, including minority and low-income communities, has adequate access to public information relating to human health or environmental planning.⁵⁸ In order to carry out the goals of environmental justice, the Memorandum specifically emphasized the use of existing environmental laws, such as NEPA.⁵⁹

B. NEPA and Environmental Justice

I believe, Mr. President, when historians look back to the years 1969 and 1970, they will say those were watershed years in terms of the U.S. environmental movement. Congress, concerned that the environment needed greater protection, took

⁵⁴ *Id.* at §4-401.

⁵⁵ *Id.* at §5-5(a) – (d).

⁵⁶ *Id.* at §6-609.

⁵⁷ *Memorandum on Environmental Justice*, Weekly Compilation of Presidential Documents, vol. 30, p. 279 [hereinafter *Presidential Memo*] { TA \l "Memorandum on Environmental Justice, Weekly Compilation of Presidential Documents, vol. 30, p. 279" \s "Presidential Memo" \c 9 }.

⁵⁸ *Id.*

⁵⁹ *Id.*

the lead and enacted major environmental statutes.... Of all these and other significant actions that took place in those 2 years, few can rival in importance the creation of the National Environmental Policy Act. Signed into law by President Nixon on January 1, 1970, it is a short and simple law with dramatic purpose: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment ... NEPA has been a tremendous success and has changed forever the way our Government makes decisions affecting the environment.⁶⁰

By enacting NEPA, Congress recognized that nearly all federal activities affect the environment in some way and mandated that before federal agencies make decisions, they must consider the effects of their actions on the quality of the human environment.⁶¹ For major federal actions significantly affecting the quality of the human environment, NEPA requires the preparation of a detailed Environmental Impact Statement (EIS) that accesses the proposed action and all reasonable alternatives.⁶² Regulations established by CEQ require that socioeconomic impacts associated with significant physical environmental impacts be addressed in the EIS, even though economic or social effects alone do not trigger an EIS.⁶³

1. CEQ Guidance

CEQ oversees the federal government's compliance with NEPA and Executive Order 12898{ TA \s "EO 12898" }.⁶⁴ In order to assist Federal agencies with the incorporation of environmental justice within the NEPA process, CEQ issued a guidance document on December 10, 1997.⁶⁵ The guidance begins with a review of NEPA and Executive Order 12898, emphasizing NEPA's broad

⁶⁰ Senator John Chafee statement from "Twenty Years Of Environmental Progress," Senate proceedings, March 25, 1992, Congressional Record p. S4141.{ TA \l "Senator John Chafee statement from \"Twenty Years Of Environmental Progress,\" Senate proceedings, March 25, 1992, Congressional Record p. S4141.\" \s "Senator John Chafee statement from \"Twenty Years Of Environmental Progress,\" Senate proceedings, March 25, 1992, Congressional Record p. S4141.\" \c 3 }

⁶¹ National Environmental Policy Act of 1969, 42 U.S.C.{ TA \s "42 U.S.C." } §4321 et. seq.

⁶² *Id.*

⁶³ Council on Environmental Quality, Executive Office of the President, Regulations for Implementing NEPA, 40 C.F.R. §1508.14{ TA \l "Council on Environmental Quality, Executive Office of the President, Regulations for Implementing NEPA, 40 C.F.R. §§1500-1508" \s "CEQ Regulations" \c 6 }.

⁶⁴ National Environmental Policy Act of 1969, 42 U.S.C.{ TA \s "42 U.S.C." } §4321 et. seq.

⁶⁵ Council on Environmental Quality, Executive Office of the President, *Environmental Justice: Guidance Under the National Environmental Policy Act*, at 1, available at <http://ceq.eh.doe.gov/nepa/nepanet.htm>{ TA \l "http://www.whitehouse.gov/ceq/nepanet/" \s "http://www.whitehouse.gov/ceq/nepanet/" \c 11 } [hereinafter CEQ *EJ Guidance*]{ TA \l "Council on Environmental Quality, Executive Office of the President, *Environmental Justice: Guidance Under the National Environmental Policy Act*" \s "CEQ EJ Guidance" \c 8 } (last visited April 22, 2002).

fundamental policy to “encourage productive and enjoyable harmony between man and his environment.”⁶⁶ It states that environmental justice issues also encompass a broad range of impacts, including impacts on the “natural or physical environment and interrelated social, cultural, and economic effects.”⁶⁷ According to the guidance, Executive Order 12898 does not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law.⁶⁸ Agencies are, however, reminded that when deciding whether their proposed action raises environmental justice issues in a particular community, they must be highly sensitive to the communities’ history or circumstances; therefore, no set formula exists to identify such effects or impacts.⁶⁹ Despite the lack of set formulas, CEQ does provide six general principles for agencies to follow. Agencies should: (1) consider the population composition of the affected area; (2) consider the relevant public health and industry data for multiple or cumulative exposure to hazards; (3) recognize the interrelated factors that may amplify the environmental effects of the proposed action; (4) develop effective public participation strategies; (5) assure meaningful community representation; and (6) seek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government’s trust responsibility to federally-recognized tribes, and treaty rights.⁷⁰ Neither NEPA nor Executive Order 12898 preclude an agency from going forward with a proposed action that has a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe, or which is environmentally unsatisfactory. Nevertheless, the CEQ guidance indicates that this finding “should heighten agency attention to alternatives...and preferences expressed by the affected community or population.”⁷¹

The CEQ Environmental Justice Guidelines, while acknowledging that an “appropriate consideration of environmental justice issues is highly dependent upon the particular facts and circumstances of the proposed action,” do offer specific guidance to follow during seven stages of the NEPA process.⁷² The seven phases are: (1) scoping; (2) public participation; (3) determining the affected environment; (4) analysis; (5) alternatives; (6) record of decision; and (7) mitigation.⁷³ The guidance concludes with a discussion of agency responsibility

⁶⁶ *Id.* at 7, *quoting* NEPA, 42 U.S.C. { TA \s "42 U.S.C. §4321" } §4321.

⁶⁷ *Id.* at 8.

⁶⁸ *Id.*

⁶⁹ *Id.* The CEQ implementing regulations define “effects” or “impacts” to include “ecological... aesthetic, historic, cultural, economic, social or health, whether direct, indirect or cumulative.” *Id.* at fn 23, *quoting*, 40 C.F.R. 1508.8.

⁷⁰ *Id.* at 9.

⁷¹ *Id.* at 10.

⁷² *Id.*

⁷³ *Id.* at 10-17.

when an agency proposed action does not trigger the specific statutory requirements for preparation of an EA or EIS, but nonetheless has a disproportionately high and adverse human or environmental impact on low-income populations, minority populations, or Indian tribes.⁷⁴ In such circumstances, agencies are encouraged to augment their procedures, as appropriate, to ensure that the otherwise applicable process or procedure for reviewing the proposed federal action addresses environmental justice concerns. The goal of public participation, in particular, should be satisfied to the “fullest extent possible” and alternatives to the proposed action should be “fully develop[ed] and consider[ed].”⁷⁵

2. EPA Guidance

EPA issued *Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses* in April 1998.⁷⁶ In this guidance, EPA defines environmental justice as “[t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.”⁷⁷ EPA states that this “goal of fair treatment is not to shift risks among populations, but to identify potential disproportionately high and adverse effects and identify alternatives that may mitigate these impacts.”⁷⁸ The EPA guidance echoes many of the general principles of CEQ’s guidance and is intended to:

- heighten awareness of EPA staff in addressing environmental justice issues within NEPA analysis and in considering the full potential for disproportionately high and

⁷⁴ *Id.* at 16. “These circumstances may arise because of an exemption from the requirement, a categorical exclusion of specific activities by regulation, or a claim by an agency that another environmental statute establishes the “functional equivalent” of an EIS or EA. For example, neither an EIS nor an EA is prepared for certain hazardous waste facility permits.” *Id.*

⁷⁵ *Id.* at 17.

⁷⁶ United States Environmental Protection Agency, Office of Environmental Justice, *Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses*, April 1998{ TA \l "United States Environmental Protection Agency, Office of Environmental Justice, *Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses*, April 1998" \s "EPA Guidance for Incorporating EJ in NEPA" \c 8 }, available at <http://ceq.eh.doe.gov/nepa/nepanet.htm> (last visited April 22, 2002).

⁷⁷ *Id.* at §1.1.1.

⁷⁸ *Id.*

- adverse human health or environmental effects on minority populations and low-income populations;
- present basic procedures for identifying and describing junctures in the NEPA process where environmental justice issues may be encountered;
- present procedures for addressing disproportionately high and adverse effects to evaluate alternative actions, and;
- present methods for communicating with the affected population throughout the NEPA process.

The EPA guidelines provide definitions of key terms, including minority and low-income populations, cumulative and indirect effects, disproportionately high and adverse effects and environmental exposure.⁷⁹ In its definition of minority populations, the guidance explains “that a minority population may be present if the minority population percentage of the affected area is ‘meaningfully greater’ than the minority population percentage in the general population.”⁸⁰ EPA’s guidance goes further than CEQ’s guidance where proposed actions may affect tribal lands or resources. In that case, EPA will encourage the affected Indian Tribe to participate as a cooperating agency.⁸¹ The guidance recognizes that the proposed federal action may so disproportionately affect the local tribes as to implicate the federal trust doctrine.⁸² Additionally, EPA states that an affected Indian Tribe may request that a dispute resolution process be initiated to resolve a conflict regarding the preferred alternative or mitigation measures proposed by the agency.⁸³ As EPA points out, a distinction must be made between Native American communities that live within their own governmental jurisdictions and those that do not.⁸⁴

The guidance concludes by emphasizing that in cases where environmental justice concerns are identified, the decision documents⁸⁵ should include a concise summary of all steps undertaken to identify environmental justice concerns and the results of those steps. In cases where environmental justice concerns are identified, the decision documents should fully discuss the concerns, explain all alternatives and mitigation options that were analyzed, and explain how environmental justice concerns factored into the decision.⁸⁶ EPA’s guidance in this area is critical since, as earlier indicated, EPA is the federal

⁷⁹ *Id.* at §2.0.

⁸⁰ *Id.* at §2.1.1.

⁸¹ *Id.* at §1.2. CEQ recently issued guidance on this topic as discussed *infra* Section III.B.2.

⁸² *Id.* at §2.1.1.

⁸³ *Id.* at 1.2.

⁸⁴ *Id.* at §2.1.1.

⁸⁵ CEQ regulations identify two types of decision documents: (1) a record of decision (ROD) following an EIS, §1508.11 and (2) a finding of no significant impact (FONSI) following an EA, §1508.13.

⁸⁶ EPA Guidance for Incorporating EJ in NEPA, *supra* note 76 at §3.2.8.

agency gatekeeper with its Clean Air Act section 309 review responsibilities to ensure all federal agencies have satisfied their environmental justice responsibilities.⁸⁷

C. Title VI and Environmental Justice

Congress passed the Civil Rights Act of 1964 in July 1964.⁸⁸ Title VI of the Civil Rights Act states that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁸⁹ The relationship between Title VI{ TA \s "Title VI" } and environmental justice is often misunderstood.⁹⁰ Several important distinctions exist:⁹¹

Title VI:

- Title VI prohibits recipients of federal financial assistance (*e.g.*, states, universities, local governments) from discriminating on the basis of race, color, or national origin in their programs or activities. (Section 601 of the Act).
- Title VI is a federal law that applies to federal financial assistance recipients (*i.e.*, persons or entities that receive federal financial assistance) and not to federal agencies themselves, unlike Executive Order 12898.
- Title VI allows persons to file administrative complaints with the federal departments and agencies that provide financial assistance, alleging discrimination based on race, color, or national origin by recipients of federal funds.
- Under Title VI, federal agencies have a responsibility to ensure that their funds are not being used to subsidize discrimination based on race, color, or national origin. This prohibition against discrimination under Title VI has been a statutory mandate since 1964. (Section 602 of the Act).

⁸⁷ See *supra* note 58, and accompanying text.

⁸⁸ Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000d - 2000d-7{ TA \l "Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000d - 2000d-7" \s "Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000d - 2000d-7" \c 2 }.

⁸⁹ Title VI, Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000d - 2000d-7{ TA \s "Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000d - 2000d-7" }.

⁹⁰ Hayden{ TA \s "Hayden" }, *supra* note 34, at 365.

⁹¹ United States Environmental Protection Agency, Office of Civil Rights, *Title VI and Environmental Justice at EPA*{ TA \l "EPA Office of Civil Rights, Title VI and Environmental Justice at EPA" \s "United States Environmental Protection Agency, Office of Civil Rights, Title VI and Environmental Justice at EPA" \c 8 }, available at <http://www.epa.gov/ocrpage1/t6andej.htm>{ TA \l "http://www.epa.gov/ocrpage1/t6andej.htm" \s "http://www.epa.gov/ocrpage1/t6andej.htm" \c 11 } (last visited April 22, 2002).

Executive Order 12898:

- Executive Order 12898 generally calls on each federal agency to achieve "environmental justice ... by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations...."
- Executive Order 12898 applies to federal agency actions and directs agencies, to the extent permitted by law, to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.
- Executive Order 12898 is a directive from the President of the United States to federal agencies intended to improve the internal management of the federal government.
- The Executive Order establishes the Administration's policy on environmental justice; it is not enforceable in court and does not create any rights or remedies.

1. EPA Guidance

EPA first issued final Title VI regulations on July 5, 1973.⁹² Issued after close consultation with Department of Justice (DoJ), these regulations required EPA's Office of Civil Rights (OCR) to process and review administrative complaints filed under Title VI.⁹³ These early regulations prohibited both intentional discrimination and facially neutral policies or practices that have the effect of discriminating based on race, color, or national origin.⁹⁴ Following the issuance of Executive Order 12250{ TA \l "Executive Order 12250, *Leadership and Coordination of Nondiscrimination Laws*, 45 Fed. Reg. 72995, (Nov. 2, 1980)" \s "EO 12250" \c 9 },⁹⁵ EPA, in conjunction with DoJ, issued final discrimination regulations prohibiting discrimination based on race, color, national origin, disability, and sex. The consolidated regulations implemented Title VI,

⁹² United States Environmental Protection Agency, *Milestones of EPA's Title VI Policy Development*{ TA \l " United States Environmental Protection Agency, *Major Milestones of EPA's Title VI Policy Development*" \s "Major Milestones" \c 8 }, available at <http://www.epa.gov/ocrpage1/milestones.htm>{ TA \l "http://www.epa.gov/ocrpage1/milestones.htm" \s "http://www.epa.gov/ocrpage1/milestones.htm" \c 11 } [hereinafter Major Milestones] (last visited April 22, 2002).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Exec. Order No. 12250, *Leadership and Coordination of Nondiscrimination Laws*, 45 Fed. Reg. 72995, November 2, 1980{ TA \s "EO 12250" } (provided, under the leadership of the Attorney General, for the consistent and effective implementation of various laws prohibiting discriminatory practices in Federal programs and programs receiving Federal financial assistance)

section 504 of the Rehabilitation Act of 1973, and section 13 of the Federal Water Pollution Control Act Amendments of 1972.⁹⁶

Executive Order 12898{ TA \s "EO 12898" } and its accompanying Memorandum increased the awareness that environmental and civil rights statutes are tools for achieving environmental justice.⁹⁷ In June 1996, recognizing the growing application of Title VI to environmental permitting, the U.S. Commission on Civil Rights issued a report on federal agencies implementation of Title VI.⁹⁸ The report recommended that EPA issue guidelines that included a detailed Title VI complaint procedure.⁹⁹ EPA responded with its *Interim Guidance*{ TA \l "United States Environmental Protection Agency, *Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits*, February 5, 1998" \s "Interim Guidance" \c 8 } for *Investigating Title VI Administrative Complaints Challenging Permits* on February 5, 1998.¹⁰⁰ This *Interim Guidance* describes how EPA's OCR processes complaints filed under Title VI that allege discriminatory environmental and health effects from environmental (pollution control) permits issued by EPA financial assistance recipients.¹⁰¹ The *Interim Guidance* went further than Title VI and included policies that were neutral on their face, but had the effect of discriminating.¹⁰² "State environmental officials, who argued that the guidance would chill environmental permitting and EPA's relationships with the states," immediately criticized the *Interim Guidance* as nebulous.¹⁰³

On March 12, 1998, within one month of initial release, EPA responded to the widespread criticism of its guidance by establishing the Title VI Implementation Advisory Committee.¹⁰⁴ The committee was comprised of environmental justice groups, representatives of state and local governments,

⁹⁶ Nondiscrimination In Programs Receiving Federal Assistance From The Environmental Protection Agency, 40 C.F.R. Part 7{ TA \l "Nondiscrimination In Programs Receiving Federal Assistance From The Environmental Protection Agency, 40 C.F.R. Part 7" \s "40 C.F.R. Part 7" \c 6 }, available at <http://www.epa.gov/ocrpage1/docs/40p0007.pdf>{ TA \l "http://www.epa.gov/ocrpage1/docs/40p0007.pdf" \s "http://www.epa.gov/ocrpage1/docs/40p0007.pdf" \c 11 } (last visited April 22, 2002).

⁹⁷ Major Milestones{ TA \s "Major Milestones" }, *supra* note 92.

⁹⁸ U.S. Commission on Civil Rights, Report No. 910-00024-2, June 1996{ TA \l "U.S. Commission on Civil Rights, Report No. 910-00024-2, June 1996" \s "Report No. 910-00024-2" \c 3 } (federal agencies implementation of Title VI) available at <http://www.epa.gov/ocrpage1/milestones.htm>{ TA \l "http://www.epa.gov/ocrpage1/milestones.milestoneshtm" \s "milestones" \c 11 } (last visited April 22, 2002).

⁹⁹ *Id.*

¹⁰⁰ United States Environmental Protection Agency, *Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits*, February 5, 1998{ TA \s "Interim Guidance" }, available at <http://www.epa.gov/ocrpage1/docs/interim.pdf> (last visited April 22, 2002).

¹⁰¹ Major Milestones{ TA \s "Major Milestones" }, *supra* note 92.

¹⁰² REITZE{ TA \s "REITZE" } *supra* note 12, at §20-12(e).

¹⁰³ *Id.*

¹⁰⁴ Major Milestones{ TA \s "Major Milestones" }, *supra* note 92.

businesses, and other interested stakeholders. After almost two years of meetings and discussions, the committee issued its report in April 1999.¹⁰⁵ The report included recommendations on techniques that may be used by EPA financial assistance recipients to operate environmental permitting programs in compliance with Title VI.¹⁰⁶ Congress joined with the states in “the most poignant example of concern over EPA’s issuance of the Guidance.”¹⁰⁷ Congress expressed its concern in both fiscal year 1999 and 2000 appropriation bills, each of which precluded EPA from using any of its funding to investigate new Title VI administrative complaints.¹⁰⁸ Finally on June 27, 2000, EPA published two draft Title VI guidance documents entitled: (1) *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance*{ TA \l " United States Environmental Protection Agency, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, June 27, 2000" \s "Draft Recipient Guidance" \c 8 }},¹⁰⁹ and (2) *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance*{ TA \l " United States Environmental Protection Agency, *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, June 27, 2000" \s "Draft Revised Investigation Guidance" \c 8 }},¹¹⁰

The *Draft Recipient Guidance* “is intended to offer suggestions to assist state and local recipients of EPA financial assistance develop approaches and activities to address potential Title VI concerns.”¹¹¹ The guidance provides examples of various programs including outreach, public assessment, and area-wide pollution reduction that may assist recipients address Title VI concerns within their own communities.¹¹² The guidance is voluntary and makes it clear that federal financial aid recipients are not required to adopt or implement any of the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Hayden *supra* note 34, at 368.

¹⁰⁸ *Id.*

¹⁰⁹ United States Environmental Protection Agency, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)* June 27, 2000{ TA \s "Draft Recipient Guidance" }, available at <http://www.epa.gov/ocrpage1/exguide.htm> (last visited April 22, 2002).

¹¹⁰ United States Environmental Protection Agency, *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*, June 27, 2000{ TA \s "Draft Revised Investigation Guidance" }, available at <http://www.epa.gov/ocrpage1/reviguid2.htm>{ TA \l "http://www.epa.gov/ocrpage1/reviguid2.htm" \s "http://www.epa.gov/ocrpage1/reviguid2.htm" \c 11 } (last visited April 22, 2002).

¹¹¹ United States Environmental Protection Agency, *Draft Title VI Guidance Documents, Fact Sheet*{ TA \l "United States Environmental Protection Agency, *Draft Title VI Guidance Documents, Fact Sheet*" \s "Fact Sheet" \c 8 }, available at <http://www.epa.gov/ocrpage1/t6docpub.htm> (last visited April 22, 2002).

¹¹² *Draft Recipient Guidance supra*, note 109.

Title VI approaches or activities described.¹¹³ The *Draft Revised Investigation Guidance* is envisioned to be the final replacement to the *Interim Guidance* issued in 1998. This final pronouncement describes procedures EPA staff may use to perform investigations of Title VI administrative complaints alleging adverse, disparate impacts caused by permitting decisions. The *Interim Guidance* differs from the *Draft Revised Investigation Guidance* in that the latter provides more detail and clarity; yet it too makes no demands on state or local officials and remains “merely non-binding policy.”¹¹⁴ The *Draft Revised Investigation Guidance* does not address complaints against EPA financial assistance recipients who happen to be federally recognized Indian tribes.¹¹⁵ EPA plans to address tribal issues in collaboration with DoJ in separate guidance, citing “unique issues of Federal Indian law” as the reason for the delay.¹¹⁶

The period of public comment has come and gone for the draft guidance. Yet, EPA has not issued final versions of the two draft guidance documents.¹¹⁷ By June 2001, EPA had sixty-six Title VI administrative complaints requiring investigation and EPA acknowledged that its program to investigate Title VI complaints “generally does not meet regulatory deadlines for processing and investigating complaints.”¹¹⁸ This non-compliance is due in large part to the prohibitions to investigate complaints Congress included in appropriation riders in FY 1999, 2000, and 2001.¹¹⁹ The prohibition was lifted in the FY 2002 appropriation rider and EPA expects the backlog of cases to be resolved by June 2003 using the *Interim Guidance*.¹²⁰

2. Application of Title VI to Environmental Justice

The interplay between Title VI and environmental justice can best be understood if one looks at environmental justice as the goal of all environmental decisions and Title VI simply as a legal tool used, often of last resort, when communities of color or low-income believe their health and their environment are being disproportionately and adversely affected (i.e., environmental injustice) by

¹¹³ *Id.*

¹¹⁴ REITZE *supra*, note 12 at §20-12(h).

¹¹⁵ United States Environmental Protection Agency, *Draft Title VI Guidance Documents, Questions and Answers*, { TA \l "United States Environmental Protection Agency, *Draft Title VI Guidance Documents, Questions and Answers*" \s "Questions and Answers" \c 3 } available at <http://www.epa.gov/civilrights/t6guidefaq.pdf> (last visited April 22, 2002).

¹¹⁶ *Id.*

¹¹⁷ *Id.* EPA received comment from June 27, 2000 until August 28, 2000, a sixty-day period. During that time period, EPA also held six separate public listening sessions. *Id.*

¹¹⁸ United States Environmental Protection Agency, FISCAL YEAR 2001 ANNUAL REPORT, { TA \l "United States Environmental Protection Agency, FISCAL YEAR 2001 ANNUAL REPORT" \s "Fiscal Year 2001 Annual Report," \c 10 } available at <http://www.epa.gov/ocfo> (last visited April 22, 2002).

¹¹⁹ *Id.*

¹²⁰ *Id.* at §III-2.

agency environmental decisions.¹²¹ Recently that tool has been dulled by two important cases. In the first case, *Alexander v. Sandoval*,¹²² the United States Supreme Court ruled that section 601 of Title VI prohibits only intentional discrimination and is the only section of the Act with an implied right of action whereby private individuals may sue to enforce.¹²³ The Court also held that section 602 allows regulations that ban disparate impact; however the Court also found that the section does not allow for a private right of action to enforce any such regulations.¹²⁴

The Supreme Court's ruling in *Alexander* left open the possibility that some other federal statute might provide the private right of action needed for an individual to enforce a federal agency regulation issued per section 602. The United States Court of Appeals for the Third Circuit answered that question in the negative in December 2001.¹²⁵ The plaintiff sought to maintain an action to prevent the issuance of an air permit that they claimed was in violation of the section 602 regulation prohibiting disparate impact discrimination. The plaintiff relied upon 42 U.S.C. §1983 as providing for this private cause of action.¹²⁶ The Third Circuit held that since a private right of action was not contained within the statute, EPA's disparate impact regulations issued per section 602 could not create such a right enforceable through another federal statute, in this case, section 1983 as asserted by the plaintiff.¹²⁷ Praising the ruling, the United States Chamber of Commerce said that the ruling affirms the concept that "federal agencies don't create federal rights. Private rights of action flow from statutes, not regulations."¹²⁸

D. Application to the Military

1. Implementation

¹²¹ Hayden{ TA \s "Hayden" }, *supra* note 34, at 365.

¹²² 532 U.S. 275 (2001).

¹²³ *Id.* at 281.

¹²⁴ *Id.* at 286-87.

¹²⁵ *South Camden Citizens in Action v. N.J. Dept. of Env'tl. Protection*, 274 F. 3rd 771 (3d Cir. 2001).

¹²⁶ *Id.* at 776-77.

¹²⁷ *Id.* at 790-91.

¹²⁸ United States Chamber of Commerce, *Chamber Hails Environmental Justice Decision – Appeals Court Denies Citizen Groups Authority to Act*, December 20, 2001{ TA \l "United States Chamber of Commerce, *Chamber Hails Environmental Justice Decision – Appeals Court Denies Citizen Groups Authority to Act*, December 20, 2001" \s "Appeals Court Denies Citizen Groups Authority to Act, December 20, 2001" \c 3 }, available at www.uschamber.com/press+room/2001+releases/December+2001/01-259a.htm (last visited April 22, 2002).

The Department of Defense published its Environmental Justice Strategy on March 24, 1995.¹²⁹ It designates the Office of the Deputy Under Secretary of Defense (Environmental Security) as the DoD lead for environmental justice.¹³⁰ To develop, help implement, and monitor activities in this area, a DoD-wide Committee on Environmental Justice (CEJ) was established.¹³¹ The strategy includes an implementation plan, which is designed to be flexible, enabling changes as new environmental justice opportunities and initiatives are identified. The strategy identifies goals in five areas: (1) implementation; (2) human health and environmental research; (3) public participation and outreach; (4) Title VI TA \s "Title VI" }; and (5) performance review.¹³² DoD indicated that it planned “to implement the Executive Order principally through its compliance with the provisions of NEPA.”¹³³ However, the implementation plan also recognizes that “[e]xisting environmental and civil rights statutes provide opportunities to address environmental hazards and economic opportunities.”¹³⁴ The strategy also identifies the installation Master Plan as a vehicle for addressing environmental justice concerns.¹³⁵ DoD commanders “will assess how their operations and activities affect the communities located near their installation” and “during periodic updates to the Master Plans, the installations will evaluate whether there are any adverse impacts of its operations or activities on any minority or low-income populations with respect to human health and the physical environment.”¹³⁶ As part of its Title VI implementation goal, the strategy incorporates by reference the applicable DoD Directive¹³⁷ and selected the DoD Legacy Program{ TA \l "Legacy Resource Management Program, Public Law 101-511 §8120 (November 5, 1990)." \s "Legacy Program" \c 2 }¹³⁸ as the model program for compliance review.¹³⁹

¹²⁹ DoD EJ Strategy{ TA \s "DoD EJ Strategy" }, *supra* note 10. This was the amended due date. *See* Executive Order 12948, 3 C.F.R., 1995 Comp., p. 321{ TA \l "Executive Order 12948, 3 C.F.R., 1995 Comp., p. 321" \s "Executive Order 12948" \c 9 }.

¹³⁰ *Id.*

¹³¹ *Id.* Membership on the CEJ is composed of “senior level staff.” *Id.*

¹³² *Id.*

¹³³ *Id.* This is consistent with guidance provided in the memorandum that was concurrently issued with Executive Order 12898. Presidential Memo, *supra* note 57.

¹³⁴ DoD EJ Strategy{ TA \s "DoD EJ Strategy" }, *supra* note 10.

¹³⁵ *Id.*

¹³⁶ *Id.* at Goal 2.

¹³⁷ DoD Directive 5500.1, Nondiscrimination in Federally Assisted Programs, available at <http://www.dtic.mil/whs/directives/corres/dir2.html> (last visited April 22, 2002).

¹³⁸ Legacy Resource Management Program, Public Law 101-511 §8120 (November 5, 1990).{ TA \s "Legacy Program" } The Legacy Program was created in November 1990 to assist DoD in balancing the intensive use of its lands for military training and testing with the protection of natural and cultural resources. The Legacy Program supports projects that promote an understanding of, and an appreciation for, natural and cultural resources, as well as promote partnerships with Native American tribal governments. Background information available at <https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Legacy/legacy.html/> (last visited April 22, 2002).

¹³⁹ DoD EJ Strategy{ TA \s "DoD EJ Strategy" }, *supra* note 10.

The implementation plan identified existing projects and programs within DoD to integrate the strategy goals. They included: (1) the Environmental Equity Project of the Department of the Army which develops case studies of Army bases being closed by Congressional action to determine what, if any, environmental justice impacts exist; (2) the Joint Land Use Studies program, developed in 1985, which works with local communities around military installations to develop compatible land use plans designed to protect community health, safety, and welfare, and the military mission; and (3) the Restoration Advisory Boards (RAB) that have long played an important role for the military by providing a liaison between installation commanders and the local community on issues of base environmental cleanup.¹⁴⁰ DoD included an Environmental Justice Participation Checklist as an aid for installation commanders to be used in preparing for all public meetings to discuss environmental impacts of proposed actions.¹⁴¹ As these examples illustrate, DoD's implementation plan was relatively easy to execute since it simply integrated the environmental justice strategies into the existing military structure for environmental compliance and community outreach, most notably NEPA and RABs.

2. Interagency Working Group

Executive Order 12898{ TA \s "EO 12898" } created the IWG, composed of federal agency representatives, and charged it with the implementation of the Order's objectives.¹⁴² Additionally, Executive Order 12898 called for the IWG to "develop interagency model projects on environmental justice that evidences cooperation among agencies."¹⁴³ The IWG is chaired by EPA and is divided into ten subcommittees, with DoD as the chairman of the Subcommittee on Outreach.¹⁴⁴ In June 1999, the IWG began to develop the concept of an Integrated Federal Interagency Environmental Justice Action Agenda{ TA \l "United States Environmental Protection Agency, IWG, *Integrated Federal Interagency Environmental Justice Action Agenda*" \s "Action Agenda" \c 3 } as a way of incorporating environmental justice in all policies, programs, and activities of federal agencies.¹⁴⁵ This Action Agenda built upon information learned in two separate national environmental justice listening sessions¹⁴⁶ sponsored by CEQ and

¹⁴⁰ Id.

¹⁴¹ Environmental Justice Participation Checklist, available at <http://web.dandp.com/enviroweb/asn/checklst.htm>{ TA \l "http://web.dandp.com/enviroweb/asn/checklst.htm" \s "web.dandp.com" \c 11 } (last visited April 22, 2002).

¹⁴² See *supra* notes 48 - 49 and accompanying text.

¹⁴³ Exec. Order No. 12898,{ TA \s "EO 12898" } *supra* note 45.

¹⁴⁴ DoD EJ Strategy{ TA \s "DoD EJ Strategy" }, *supra* note 10.

¹⁴⁵ United States Environmental Protection Agency, IWG, *Integrated Federal Interagency Environmental Justice Action Agenda*{ TA \s "Action Agenda" }, available at <http://www.epa.gov/oeca/main/ej/iwg> (last visited April 22, 2002).

¹⁴⁶ Id. The first session was held in Los Angeles, CA on July 11, 1998 and the second was held on March 6, 1999 in New York, NY. Id.

EPA, as well as a national conference entitled "Environmental Justice: Strengthening the Bridge Between Economic Development and Sustainable Communities."¹⁴⁷ The Action Agenda, published in November 2000, consisted of four key areas: (1) Promote Greater Coordination and Cooperation Among Federal Agencies; (2) Make Government More Accessible and Responsive to Communities; (3) Ensure Integration of Environmental Justice in Policies, Programs and Activities of Federal Agencies; and (4) Initiate Environmental Justice Demonstration Projects to Develop Integrated Place-Based Models for Addressing Community Livability Issues.¹⁴⁸ These areas were designed to create dynamic and proactive partnerships among community-based organizations, business and industry, non-governmental organizations, and government at all levels to help communities address local environmental justice issues.¹⁴⁹

In February 2002, the IWG issued its *Status Report* { TA \l "United States Environmental Protection Agency, IWG, *Status Report on the Environmental Justice Collaborative Model: A Framework to Ensure Local Problem-Solving*, February 2002" \s "Status Report" \c 10 } on the *Environmental Justice Collaborative Model: A Framework to Ensure Local Problem-Solving*.¹⁵⁰ The report summarizes lessons learned in 2001 from the implementation of the demonstration projects called for in the Action Agenda { TA \s "Action Agenda" }.¹⁵¹ Fifteen demonstration projects comprised the core of the Action Agenda and served as the basis of the report. The IWG cautioned that the "set of environmental, economic, public health and social concerns known as environmental justice issues are perhaps some of the most complex challenges to the nation."¹⁵² Despite this complexity, the IWG identified five basic elements common to all the demonstration projects: (1) Issue Identification and Leadership Formation; (2) Capacity and Partnership Building; (3) Strategic Planning and Vision; (4) Implementation; and (5) Identification and Replication of Best Practices.¹⁵³

One of the demonstration projects, *Environmental Justice in Indian Country: A Roundtable to Address Conceptual, Political and Statutory Issues*, sought to address the broad range of tribal cultural, religious, economic, social, legal and other issues related to environmental justice in Indian country.¹⁵⁴ The

¹⁴⁷ *Id.* The conference was held on June 10-12, 2000 in Hilton Head, SC. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ United States Environmental Protection Agency, IWG, *Status Report on the Environmental Justice Collaborative Model: A Framework to Ensure Local Problem-Solving*, [hereinafter *Status Report*] February 2002 { TA \s "Status Report" }, available at <http://www.epa.gov/oeca/main/ej/iwg> (last visited April 22, 2002).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at Appendix II.

¹⁵² *Id.* at 17.

¹⁵³ *Id.* at 8.

¹⁵⁴ *Id.* at 58.

project convened a national Roundtable gathering in New Mexico and published a comprehensive report on January 31, 2001.¹⁵⁵ DoD participated in the Roundtable and in formulating the lessons learned. Two important concepts were gleaned from the Roundtable: (1) Indians define environmental justice in broader terms of injustice since they already believe they are bearing a disproportionate share of negative environmental consequences due to their spiritual, economic, and political connections to the land and water of an area and (2) Environmental justice in Indian country is hampered by most federal agencies' general lack of understanding about the meaning of tribal sovereignty, federal-trust responsibility, government-to-government relationships, treaty rights, and tribal citizenship.¹⁵⁶

III. Federal Trust Doctrine

We were here since time immemorial. People will come to understand that we're still here and we're getting stronger. There are three different sovereigns within the United States: the federal government, the state governments and the tribal governments.¹⁵⁷

Thus is expressed the often unknown, frequently misunderstood and sometimes ignored concept of Indian tribal political status in the United States. In order to intelligently discuss the current application of the federal trust doctrine to the collective tribes, it is imperative to set the issue within the broader frame of history with a brief review.¹⁵⁸

A. Historical Development

The relationship between Indians and other political entities within the United States that has evolved over the centuries is complex. From the Iroquois League formed over a thousand years ago to the recent renewal of the Makah Nation's traditional whale hunting, the history of indigenous nations' struggle to

¹⁵⁵ Roundtable, *supra* note 20.

¹⁵⁶ *Id.*

¹⁵⁷ John Echohawk, *We are Sovereign People*, in SURVIVING IN TWO WORLDS: CONTEMPORARY NATIVE AMERICAN VOICES, ed. Lois Crozier-Hogle and Darryl Babe Wilson (Austin: University of Texas Press, 1997) TA \l "John Echohawk, *We are Sovereign People*, in SURVIVING IN TWO WORLDS: CONTEMPORARY NATIVE AMERICAN VOICES, ed. Lois Crozier-Hogle and Darryl Babe Wilson (Sustin: University of Texas Press, 1997)" \s "Echohawk" \c 10 }, 69.

¹⁵⁸ For a complete review of Indian history and law, there is an enormous array from which to select. For background, this author relied on Francis Paul Prucha, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS, 2 vols., Lincoln: University of Nebraska Press (1984) TA \l "Francis Paul Prucha, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS, 2 vols., Lincoln: University of Nebraska Press (1984)" \s "Prucha" \c 10 }.

retain and exercise a measure of political independence is rich and detailed.¹⁵⁹ When “civilized” Europeans entered upon the timeline, the history became one of conquest; a conquest that continues to underlie the entire legal framework of current American Indian law.¹⁶⁰ In reviewing American Indian history, scholars typically address it in eras of law and policy.¹⁶¹ In order to appreciate the scope of this history, Appendix A “provides a general overview of the major policies and laws, and tribal responses to those directives, from the early American period to the present.”¹⁶²

1. Discovery

In “discovering” the New World, Conquistadors came in the name of the King and the Church. When they entered a village, the priests accompanying the soldiers would read the *Requerimiento*, a formal demand, in Spanish, that the indigenous people adopt the Christian faith and accept the authority of the King. The *Requerimiento* declared to the Indians that “Jesus was lord of the universe, that he had appointed Saint Peter as Bishop of Rome, and that the Pope had bestowed America on the King of Spain.”¹⁶³ Despite the fact that the Indians did not speak Spanish, had no idea who Jesus was nor the Pope nor the King, they were required to acknowledge the King’s sovereignty or die. As if to add insult to injury, the *Requerimiento* advised the Indians, “and we protest that the deaths and losses which shall result from this are your fault...”¹⁶⁴ Thus, Indians were viewed as heathen savages who, upon discovery by European explorers, retained only limited “native title” to the lands they occupied, subject to the will of the sovereign that funded the discovery.¹⁶⁵ Universally accepted by all civilized nations, it took centuries for this “doctrine of discovery” to develop and to be ultimately articulated by the Chief Justice of the United States, John Marshall.¹⁶⁶

¹⁵⁹ DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM (Rowman and Littlefield, 2001){ TA \l "DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM (Rowman and Littlefield, 2001)" \s "WILKINS" \c 10 } at 103.

¹⁶⁰ THOMAS A. BERGER, A LONG AND TERRIBLE SHADOW: WHITE VALUES, NATIVE RIGHTS IN THE AMERICAS SINCE 1492, (University of Washington Press, 1999){ TA \l "THOMAS A. BERGER, A LONG AND TERRIBLE SHADOW: WHITE VALUES, NATIVE RIGHTS IN THE AMERICAS SINCE 1492, (University of Washington Press, 1999)" \s "BERGER" \c 10 }.

¹⁶¹ FRANCIS PAUL PRUCHA{ TA \s "Prucha" }, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS, 2 vols., Lincoln: University of Nebraska Press (1984).

¹⁶² WILKINS{ TA \s "WILKINS" }, *supra* note 159, at 104-105.

¹⁶³ BERGER{ TA \s "BERGER" }, *supra* note 160, at 3.

¹⁶⁴ *Id.*

¹⁶⁵ Gavin Clarkson, *Recent Developments: Not because They are Brown, but because of EA: Rice v. Cayetano*, 24 HARV. J. L. & PUB. POLICY 921, 924 (2001){ TA \l "Gavin Clarkson, *Recent Developments: Not because They are Brown, but because of EA: Rice v. Cayetano*, 24 HARV. J. L. & PUB. POLICY 921 (2001)" \s "Clarkson" \c 10 }.

¹⁶⁶ The doctrine is developed *infra* in Section III.A.2.(b).

2. Treaty Making and Removal

From the time of discovery on the North American continent until the early decades of the 19th century, settlers more often than not treated indigenous Indians with respect and as allies. The Indians, not the European newcomers, held the balance of power and the knowledge of the land. Indians and early settlers worked together. When European wars spread to the New World, the Indians were sought as allies by all sides. The most powerful and influential of the northeastern tribes were the Iroquois.¹⁶⁷

a) Iroquois Confederacy

Berger concisely describes the Iroquois Confederacy thusly: "Iroquois is a term designating a confederacy of Indian nations, known to Europeans as the League of the Iroquois or the Iroquois Confederacy. At first the Confederacy consisted of the Seneca, Cayuga, Oneida, Onondaga and Mohawk nations. When the Tuscarora were driven from the Carolinas, they migrated northward; the five nations became the Six Nations. Iroquois territory comprised a large part of what is now New York State, from the Adirondack Mountains to the Great Lakes and from Lake Ontario to Pennsylvania. The Iroquois were agriculturalists, living in stockaded towns or villages. The people lived in longhouses; several families might live in one such dwelling. Villages might have a few small longhouses or as many as fifty. The Iroquois used the metaphor of the Longhouse to describe their confederacy; the Seneca, as the most westerly tribe, were known as 'keepers of the western door,' and the Mohawk as 'keepers of the eastern door.' At the time of contact the Iroquois numbered 10,000 to 15,000. Some put the figure higher, at 20,000 to 30,000."¹⁶⁸

The political organization of the Iroquois was unique among existing governments of the day: families, organized into clans, formed the separate tribes, and were independent. The independent tribes formed loosely into a confederation and were represented on the Great Council, a body of fifty men, empowered to act for the Confederacy as a whole.¹⁶⁹ This organizational structure had great influence on many of the soon-to-be U.S. founding fathers, including Benjamin Franklin. The Iroquois Confederation is believed by many to have provided the

¹⁶⁷ BERGER{ TA \s "Berger" }, *supra* note 160, at 56.

¹⁶⁸ *Id.* at 57.

¹⁶⁹ The parallel to our modern political organization is striking: communities (families), organized into counties (clans), form the independent States (tribes). States are represented in Congress (Great Council) and act for the whole nation. The main differences were that the Iroquois Confederacy had no President or King and all possessions were held in trust for all people. BERGER{ TA \s "Berger" }, *supra* note 160, at 58.

original genesis of Federalism.¹⁷⁰ The political and military sophistication of the Iroquois served them well through two centuries of European warring in the New World, culminating in King George III's Royal Proclamation of 1763.¹⁷¹ In this proclamation, following the British victory in the Seven Years War,¹⁷² the Crown provided that:

it being essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as ... are reserved to them, or any of them, as their Hunting Grounds ... therefore ... any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians.... And we do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and License for that Purpose first obtained.¹⁷³

The Proclamation furthered the legal premise that the Sovereign controlled aboriginal land by virtue of discovery and established the basis for the theory that only the Sovereign could devise such land, which was held in trust for the Indian Tribes.¹⁷⁴ These premises would be relied upon sixty years later to support the legal opinions of Chief Justice Marshall in his Indian trilogy.

b) Marshall Trilogy

The American Revolution having been won yielded the birth of a new nation, the United States of America. Presently secure from European domination, the frontier became the new goal. In the Treaty of Paris, signed in 1783 and formally ending the Revolutionary War, the British surrendered all claims to the lands south of the Great Lakes and west to the Mississippi River. The British tried, but were unsuccessful in establishing an Indian buffer state.

¹⁷⁰ BRUCE E. JOHANSEN, *FORGOTTEN FOUNDERS* (Ipswich, Mass., Gambit, 1982){ TA \l "BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS (Ipswich, Mass., Gambit, 1982)" \s "Johansen" \c 10 }. Federalists believed in a strong federal government empowered to act for the benefit of the whole nation. Johansen notes that Chief Justice John Marshall was a Federalist.

¹⁷¹ BERGER{ TA \s "BERGER" }, *supra* note 160, at 61.

¹⁷² Known to most American history students as the French and Indian War.

¹⁷³ BARBARA GRAYMONT, *THE IROQUOIS IN THE AMERICAN REVOLUTION* (Syracuse University Press, 1972){ TA \l "BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION (Syracuse University Press, 1972)" \s "Graymont" \c 10 } *quoting* from the Royal Proclamation of 1763{ TA \l "Royal Proclamation of 1763" \s "Royal Proclamation of 1763" \c 6 }.

¹⁷⁴ BERGER{ TA \s "BERGER" }, *supra* note 160, at 62.

Also in 1783, the American Congress enacted a proclamation that paralleled the Royal Proclamation of 1763. The American proclamation asserted dominion over the lands west of the colonies to the Mississippi River and prohibiting settlement or purchase “without express authority” of Congress.¹⁷⁵ The in-avoidable westward pressure by settlers seeking to appropriate Native American land seems never to have been in doubt despite the moral thread of the American Proclamation. The morally persistent question: “How does one people, one race, justify the taking of the lands of another people, another race?” never seemed to cause much official policy concern. Rather the question was much more pragmatic: “what would be the legal rationale?”¹⁷⁶ Chief Justice John Marshall developed the necessary rationale in a trilogy of cases decided in the 1820’s and 1830’s.

(1) *Johnson v. M’Intosh*¹⁷⁷

In the first case, the Chief Justice articulated the theory of “discovery” and “conquest” as the legal basis for the acquisition by the United States of legal title in all Indian lands. The litigation involved the question of whether the federal courts had jurisdiction to adjudicate the validity of the title to land sold by a foreign (Indian) government to an American citizen.¹⁷⁸ In 1773, the Illinois and Piankeshaw Tribes deeded certain of their lands to the plaintiff. Then again in 1775, those same tribes deeded, by treaty, the same lands to the British crown without reserving the earlier sale in the treaty.¹⁷⁹ As discussed earlier, by the Treaty of Paris, the British crown ceded its claim to these lands, among others. Subsequently, defendant obtained title per established and recognized U.S. law and plaintiff brought suit to quiet that title. Marshall began his opinion by stating that the title plaintiff received from the Indians was valid under Indian law and custom at the time acquired, but when that land was subsequently deeded to the British crown by treaty without reservation, then international law required that the land tenure system of the new sovereign control.¹⁸⁰ Next, Marshall had to wrestle with the more vexing issue: by what legal right did the United States Congress have to convey lands ceded to it by a European “discover” yet occupied then and now by Indians? Here is where Marshall articulated his “doctrine of discovery” theory to not only include the right of the sovereign to the possession of the land,¹⁸¹ but by discovery combined with “conquest,” the federal government, he opined, gained fee title to the lands and could therefore convey title without

¹⁷⁵ *Id.* at 69.

¹⁷⁶ *Id.* at 68.

¹⁷⁷ 21 U.S. (8 Wheat) 543 (1823).{ TA \l "Johnson v. M’Intosh, 21 U.S. (8 Wheat) 543 (1823)" \s "21 U.S." \c 1 }

¹⁷⁸ *Id.* at 571-72.

¹⁷⁹ This lack of reservation in the treaty was critical to Marshall’s reasoning since it was an acceptable practice of the time and well understood by all governments, both Indian and European. *Id.*

¹⁸⁰ *Johnson*, 21 U.S. (8 Wheat) at 572.

¹⁸¹ That is the right to purchase or acquire it from its occupants, the Indians. *Id.*

interference from the states or the Indians.¹⁸² This fictionalization of discovery into conquest was as Marshall “confessed, an unjust but expedient solution.”¹⁸³ He wrote:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.¹⁸⁴

Marshall, while acknowledging the Indian’s rights were diminished, nevertheless reaffirmed their status as sovereign independent nations with a right of occupancy on the land.¹⁸⁵ He was able to further articulate the status of Indian rights in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.¹⁸⁶

(2) *Cherokee Nation v. Georgia*¹⁸⁷

Following the *Johnson* ruling, the southern states of Georgia, Tennessee, Alabama, and Mississippi disagreed with Marshall’s ruling that Indian tribes were independent sovereign nations with a right of occupancy on land held in fee by the federal and state governments. The states asked how the sovereign (federal or state government) could own Indian land in fee and yet not be able to exert

¹⁸² *Id.* at 588.

¹⁸³ RUSSEL L. BARSH AND JAMES Y. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY*, 48 (University of California Press, 1980){ TA \l "RUSSEL L. BARSH AND JAMES Y. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY*, 48 (University of California Press, 1980)" \s "BARSH AND HENDERSON" \c 10 }.

¹⁸⁴ *Johnson*, 21 U.S. (8 Wheat) at 591-92.

¹⁸⁵ *Id.* at 574.

¹⁸⁶ Referred together as the *Cherokee Cases* since, as discussed *infra*, they both involved the Cherokee Nation’s battle with the State of Georgia over recognition of Cherokee sovereignty.

¹⁸⁷ 30 U.S. (5 Pet.) 1 (1831){ TA \l "Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)" \s "Cherokee Nation, 30 U.S. (5 Pet.)" \c 1 }

jurisdiction over that land and its occupants?¹⁸⁸ Not satisfied to wait for Congress to get around to the Indian “problem” in Georgia,¹⁸⁹ the state assembly incorporated the lands of the Cherokee Nation, instituted state courts and police, annulled all tribal laws, and imprisoned tribal officials.¹⁹⁰ Subsequently, the state convicted George Corn Tassels, a Cherokee citizen, of the murder of another Cherokee on formally Cherokee territory. As the case made its way to the Supreme Court on appeal of the state’s lack of jurisdiction, the Georgia assembly ordered that George Corn Tassel’s sentence to death be swiftly executed; it was. With the case now moot, the Cherokee Nation moved the Supreme Court for a general injunction against Georgia.¹⁹¹ The Court took up the issue, but the “state was so set on defying any adverse order that it did not bother to put in an appearance in its own defense.”¹⁹² Chief Justice Marshall begins the majority opinion with eloquent words for the Cherokee Nation’s plight:

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.¹⁹³

Despite the sympathetic opening, Marshall avoided a constitutional crisis by deciding the case on strictly jurisdictional grounds; that the Cherokee Nation was neither a state of the Union nor a foreign state and therefore not within the scope of Article III of the United States Constitution.¹⁹⁴ If the Cherokee Nation is not a state of the Union or a foreign state, then what is it? Marshall answered:

¹⁸⁸ BARSH AND HENDERSON{ TA \s "BARSH AND HENDERSON" }, *supra* note 183, at 51.

¹⁸⁹ Georgia had earlier relinquished her western land claims to the U.S. on the condition that the U.S. purchase for Georgia all tribal lands lying within the state’s chartered boundaries, at federal expense and “as soon as it could be done peaceably and on reasonable terms.” *Id.* at 52.

¹⁹⁰ Act No. 545 of 20 December 1828, and Act No. 546 of 19 December 1829 (William C. Dawson, ed., A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA 198 [Milledgeville, GA, 1831]){ TA \l "Act No. 545 of 20 December 1828, and Act No. 546 of 19 December 1829 (William C. Dawson, ed., A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA 198 [Milledgeville, GA, 1831])" \s "Dawson" \c 2 }.

¹⁹¹ *Cherokee Nation*, 30 U.S. (5 Pet.){ TA \s "Cherokee Nation, 30 U.S. (5 Pet.)" } at 15.

¹⁹² BARSH AND HENDERSON{ TA \s "BARSH AND HENDERSON" }, *supra* note 183, at 52.

¹⁹³ *Cherokee Nation*, 30 U.S. (5 Pet.){ TA \s "Cherokee Nation, 30 U.S. (5 Pet.)" } at 15.

¹⁹⁴ *Id.* at 20.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations*. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of *pupilage*. Their relation to the United States resembles that of a *ward* to his guardian.¹⁹⁵

Marshall was attempting to make it plain that the Cherokee Nation, while a part of the national political system, nevertheless existed outside the political arrangement of the state and federal governments.¹⁹⁶ However, his use of the above emphasized phrases created more problems than solutions.¹⁹⁷

(3) *Worcester v. Georgia*¹⁹⁸

The status of Georgia's invasion of Cherokee lands was back before the Supreme Court the following year, this time with a case without jurisdictional limitations. Samuel Worcester was a New England missionary convicted and condemned to hard labor for four years in the penitentiary by the courts of the State of Georgia for being upon the lands of the former Cherokee Nation without leave from the State of Georgia.¹⁹⁹ However, Brother Samuel was living among the Cherokees under the authority of the President of the United States and was there doing the express bidding of the Congress of the United States – to teach the Indians to read the Gospel message.²⁰⁰ Georgia had created a case full of unsympathetic facts. The Chief Justice, writing for a unanimous Court, signaled the conflict a ruling against Georgia would create by writing the Court's "duty,

¹⁹⁵ *Id.* at 17 (emphasis added).

¹⁹⁶ Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STANFORD L. REV. 500 (1969).{ TA \l "Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STANFORD L. REV. 500 (1969)" \s "Burke" \c 10 }

¹⁹⁷ *Id.*

¹⁹⁸ 21 U.S. (6 Pet.) 515 (1832){ TA \l "Worcester v. Georgia, 21 U.S. (6 Pet.) 515 (1832)" \s "21 U.S. (6 Pet.) 515 (1832)" \c 1 }.

¹⁹⁹ *Id.* at 536.

²⁰⁰ *Id.* at 538. This is a theme repeated throughout American Indian history. The federal government flagrantly and repeatedly violated the First Amendment by officially sponsoring Christian mission-aries to teach and convert the Indians to Christianity. See generally PRUCHA{ TA \s "PRUCHA" }, *supra* note 161.

however unpleasant, cannot be avoided.”²⁰¹ Marshall then goes into a poetic soliloquy examining the rightfulness of this claim. His vibrant theme remains in the consciousness of the modern world, often quoted by indigenous peoples from around the world.²⁰² Having concluded the claim was properly before the court, Marshall lays out his doctrine of discovery previously articulated in *Johnson*. He next discusses the rights of the United States to Indian lands by examining the history and treaties entered into by the two governments as sovereigns. In discussing the political status of the Cherokee Nation, Marshall states:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.²⁰³

Since the Cherokee Nation was “a distinct community occupying its own territory with boundaries accurately described,” the laws of Georgia were without force inside the Cherokee Nation and therefore void.²⁰⁴ In clearly articulating the status of the Cherokee Nation as governed by consent and the concept of dependency as recognized in international law, Marshall managed to overrule his earlier *Cherokee Nation* characterization of the relationship as one of *ward, domestic dependant nation*, or other “subordination arising out of Indians’ nature or condition.”²⁰⁵ Yet those unfortunate phrases of *Cherokee Nation* continue to haunt Indian law.²⁰⁶

²⁰¹ 21 U.S. (6 Pet.) at 541.

²⁰² *Id.* at 542-43. Although too long to quote here, the passage is worth “holding ... in our recollection [so it] might shed some light on existing pretensions.” *Id.* For the fact that other indigenous people have used the passage as an expression of their rights see BERGER{ TA \s "BERGER" }, *supra* note 160, at 79.

²⁰³ *Worcester*, 21 U.S. (6 Pet.) at 559-60.

²⁰⁴ *Id.* at 562.

²⁰⁵ BARSH AND HENDERSON{ TA \s "BARSH AND HENDERSON" }, *supra* note 183, at 58.

²⁰⁶ *Id.* at 61.

The Supreme Court had unanimously spoken. Brother Samuel was to be freed and the Cherokee Nation protected by the United States government from the laws and invasion of the State of Georgia. But history tells us otherwise, as the words reportedly spoken by the person entrusted with the responsibility of carrying out the laws of the United States foreshadowed: “John Marshall has made his judgment, now let him enforce it!”²⁰⁷ Thus, President Andrew Jackson refused to enforce the Court’s order and allowed Georgia to continue to assert jurisdiction over the Cherokee Nation. The President and Congress had their own solution to the “Indian problem” — removal.²⁰⁸ Thus began the Cherokee Nation’s long march leading ultimately and tragically to the Trail of Tears.

3. Reservations and Assimilation

In order to remove Indians from the East, it was necessary to have a place set aside for them to go to — this place became Indian Country, defined as:

all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi, and not within any state to which the Indian title has not been extinguished, for the purposes of this Act, [shall be] deemed to be the Indian country.²⁰⁹

This “solution” was believed by many, even President Jackson, to afford the Indians a place of their own, for as long as they chose to remain, where they could be free to govern themselves without white settler interference or state governmental controls.²¹⁰

As the years went by, Congress became increasingly hostile to Indians as the “solution” never materialized. Congress ended treaty making with Indian Tribes²¹¹ and enacted a series of rules that sought to regulate Indian family, religious, and economic affairs.²¹² The Bureau of Indian Affairs (BIA) was moved from the War Department to the newly created Interior Department and it administered these rules. During this period, BIA agents dominated tribal

²⁰⁷ BERGER{ TA \s "BERGER" }, *supra* note 160, at 81. Jackson was the champion of the “solution” of Indian removal to lands west of the Mississippi. *Id.*

²⁰⁸ *Id.* at 85

²⁰⁹ Indian Trade and Intercourse Act, 4 Stat. 729 (1834).{ TA \l "Indian Trade and Intercourse Act, 4 Stat. 729 (1834)" \s "Indian Trade and Intercourse Act" \c 2 }

²¹⁰ BARSH AND HENDERSON{ TA \s "BARSH AND HENDERSON" }, *supra* note 183, at fn 43.

²¹¹ *Id.* at 62, *citing* The Act of March 1871, 16 Stat. 566 (1871).{ TA \l "The Act of March 1871, 16 Stat. 566 (1871)" \s "The Act of March 1871" \c 2 }

²¹² *Id.*

affairs.²¹³ As American expansion crossed the Mississippi and headed west, the BIA's mission focused on assimilation. Here again, two great philosophical concepts conflicted with one another: (1) the Indian sacred belief that land is inalienable, that it is held in common by all members of the tribe and an interest in the land is acquired by birthright; versus (2) the dominant European belief that land is alienable, a commodity to be bought and sold. The Europeans were concerned that if land were inalienable, this would impede its profitable use.²¹⁴ Such a conflict created no room for compromise. Therefore U.S. policy set about taking collectively owned lands away from the tribes and allotting parcels to individual tribe members.²¹⁵ In an address to Congress in 1901, President Theodore Roosevelt expressed his view of the assimilation policy:

The time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a *mighty pulverizing engine* to break up the tribal mass [acting] directly upon the family and the individual....²¹⁶

During this period, the Judiciary joined the Legislative and the Executive branches in support of this policy by issuing rulings adverse to Indians in a number of cases. They ruled that despite the unambiguous language of the Fourteenth Amendment, Indians could not become citizens²¹⁷ and that they were subject to the "plenary power" of Congress in their domestic affairs, without protection of the Bill of Rights.²¹⁸

4. Reorganization

In 1928, the Meriam Report documented the failures of the current Indian policies.²¹⁹ Congress responded with passage of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. §461 *et. seq.*

²¹³ WILKINS{ TA \s "WILKINS" }, *supra* note 159, at 108.

²¹⁴ BERGER{ TA \s "BERGER" }, *supra* note 160, at 100.

²¹⁵ General Allotment Act of 1887, 24 Stat. 388 (1887){ TA \l "General Allotment Act of 1887, 24 Stat. 388 (1887)" \s "General Allotment Act of 1887" \c 2 } This statute is also known as the Dawes Act after Senator Henry S. Dawes of Massachusetts.

²¹⁶ 15 Messages & Papers of the Presidents 6672 (1901){ TA \l "15 Messages & Papers of the Presidents 6672 (1901)" \s "15 Messages & Papers of the Presidents 6672 (1901)" \c 3 }(emphasis added).

²¹⁷ Elk v. Wilkins, 112 U.S. 94 (1884){ TA \l "Elk v. Wilkins, 112 U.S. 94 (1884)" \s "Elk v. Wilkins" \c 1 }. The ruling was overcome forty years later by Congressional Act of 2 June 1924, 43 Stat. 253 (1924).

²¹⁸ United States v. Kagama, 118 U.S. 375 (1886){ TA \l "United States v. Kagama, 118 U.S. 375 (1886)" \s "U.S. v. Kagama" \c 1 }.

²¹⁹ Lewis Meriam, Institute for Government Research, Studies in Administration, *The Problem of Indian Administration* (New York: Johns Hopkins University Press, 1928){ TA \l "Lewis Meriam, Institute for Government Research, Studies in Administration, *The Problem of Indian Administration* (New York: Johns Hopkins University Press, 1928)." \s "Lewis Meriam" \c 10 }

(2000)" \s "IRA" \c 2 }) of 1934.²²⁰ The Act allowed tribes to adopt constitutions and to reestablish structures for governance – “tribal sovereignty was now to be encouraged rather than destroyed.”²²¹ During this period, many tribes thrived as they exercised self-rule and policy controls over their land and peoples, but others suffered as the IRA model constitution adopted by the tribes rarely matched their traditional understanding of political authority.²²² The Act, however, was effective in stopping the rapid loss of Tribal lands.²²³

5. Termination

After World War II, congressional policy towards the Indians reversed itself once again. A 1949 *Report on Indian Affairs* by the Hoover Commission recommended “an about-face” in federal policy: ‘complete integration’ of the Indians should be the goal so that Indians [will] move “into the mass of the population as full ... ‘citizens.’”²²⁴ The official congressional policy in 1953 was “to end [the Indians’] status as wards of the United States” and thus end the United States’ trust responsibilities to the tribes.²²⁵ During this brief period of 1945 – 1969, over 100 Indian Tribes were “terminated,” their land released, and all federal relationship ended.²²⁶

6. Self-determination

With yet another about face, federal government relations entered the modern era in the 1970s by recognizing “that only tribal control of Indian policy and lasting guarantees of sovereignty could assure tribal survival in the United States.”²²⁷ President Nixon declared that tribal self-determination would be the goal of his Administration.²²⁸ The Supreme Court held that Indians were members of *quasi-sovereign tribal entities* and that Indian status was thus “political rather

²²⁰ 25 U.S.C. 461 *et. seq.* (2000){ TA \s "IRA" }. The IRA implemented tribal re-organizations create modern problems since some traditional tribal leaders refuse to recognize the legitimacy of “white-implemented” governmental structure of the tribes.

²²¹ Clarkson{ TA \s "Clarkson" }, *supra* note 165, at 935.

²²² WILKINS{ TA \s "Wilkins" }, *supra* note 159, at 114.

²²³ *Id.*

²²⁴ Clarkson{ TA \s "Clarkson" }, *supra* note 165, at 936.

²²⁵ H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953){ TA \l "H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953)" \s "H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953)" \c 2 }.

²²⁶ Wilkins{ TA \s "Wilkins" }, *supra* note 159, at 114. This is estimated to have affected approximately 1,362,155 acres. *Id.*

²²⁷ Clarkson{ TA \s "Clarkson" }, *supra* note 165, at 937. This change in attitude followed the takeover of various public buildings and land by Indians and saw the emergence of the Indian Activist Movement. *Id.*

²²⁸ Samuel R. Cook, *Self –Determination without Termination: Richard Nixon’s Indian Policy Revisited*, 1 NATIVE AMER. STUDIES 12 (1998){ TA \l "Samuel R. Cook, *Self –Determination without Termination: Richard Nixon’s Indian Policy Revisited*, 1 NATIVE AMER. STUDIES 12 (1998)" \s "Cook" \c 10 }.

than racial in nature.”²²⁹ Despite the victories, there were also setbacks for tribal self-rule as states sought to limit tribal influence. States were supported by the Supreme Court, which limited tribal control over law enforcement of non-Indians,²³⁰ hunting and fishing²³¹ and water rights.²³² In the 1980s, the Supreme Court decided two important cases affecting Indian religious rights. “In *Lyng v. Northwest Indian Cemetery Protective Association*{ TA \l "Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)" \s "Lyng v. Northwest Indian Cemetery Protective Association" \c 1 },²³³ the Court ruled that the Constitution's free exercise clause did not prevent governmental destruction of the most sacred sites of three small tribes in Northern California. And in *Employment Division, Department of Human Resources v. Smith*{ TA \l "Employment Division, Department of Human Resources v. Smith, 485 U.S. 99 (1988)" \s "Employment Division, Department of Human Resources v. Smith" \c 1 },²³⁴ the Court granted certiorari and remanded back to the Oregon Supreme Court a case involving whether an Oregon statute criminalizing peyote provided an exception for Indian religious use.”²³⁵

As he did in the area of environmental justice, President Clinton and his administration helped advance the cause of Indian sovereignty by issuing Executive Orders in the areas of Indian sacred sites, tribal colleges and universities, American Indian and Alaska Native education, and the distribution of eagle feathers for Native American religious purposes.²³⁶ The most recent executive guidance in this area was an executive order addressing consultation with tribal governments.²³⁷ In a historic speech to the leaders of the federally recognized tribes, President Clinton said, "Together we can open the greatest era of cooperative understanding and respect among our people ever ... and when we do, the judgment of history will be that the President of the United States and the leaders of the sovereign Indian Nations met ... and together lifted our great nations to a new and better place.”²³⁸

²²⁹ *Morton v. Mancari*, 417 U.S. 535, 554 (1974){ TA \s "Morton v. Mancari" }

²³⁰ *Oliphant v. Suquamish*, 435 U.S. 191 (1978){ TA \l "Oliphant v. Suquamish, 435 U.S. 191 (1978)" \s "Oliphant v. Suquamish" \c 1 }.

²³¹ *Montana v. United States*, 450 U.S. 544 (1981){ TA \l "Montana v. United States, 450 U.S. 544 (1981)" \s "Montana v. United States" \c 1 }.

²³² *Nevada v. United States*, 463 U.S. 110 (1983){ TA \l "Nevada v. United States, 463 U.S. 110 (1983)" \s "Nevada v. United States" \c 1 }.

²³³ 485 U.S. 439 (1988){ TA \s "Lyng v. Northwest Indian Cemetery Protective Association" }.

²³⁴ 485 U.S. 99 (1988){ TA \s "Employment Division, Department of Human Resources v. Smith" }.

²³⁵ *WILKINS*{ TA \s "WILKINS" }, *supra* note 159, at 117.

²³⁶ *Id.* at 118.

²³⁷ Discussed *infra* at Section III. B. 1.

²³⁸ Speech by President William J. Clinton on April 29, 1994, *available* at <http://www.doi.gov/ocit/docs/policies.htm>{ TA \l "http://www.doi.gov/ocit/docs/policies.htm" \s "www.doi.gov" \c 11 } (last visited April 22, 2002).

B. Scope

Having now traced the history and legal status of the relationship between the federal government and the American Indian Tribes, we turn to the examination of the federal trust doctrine. As we have seen, the concept is steeped in history and poetic judicial oratory. It is the subject of an Executive Order, and is relied upon in treaties and Acts of Congress, yet surprisingly, there is no generally agreed upon definition of the “federal trust doctrine.”²³⁹ Despite the pronouncements by courts or at the treaty table, history seems to side with a minority of commentators who argue that the doctrine is not even a legal principle, but merely a moral judgment on the part of the U.S. government.²⁴⁰ However, the “vast majority of political and legal scholars, jurists, and federal policy-makers assert...that the federal trust doctrine is an ancient and entrenched, if ambiguous, presence overarching the tribal-federal relationship.”²⁴¹ Senator Daniel Inouye, D-Hawaii, Vice-chairman of the Senate Committee on Indian Affairs articulated the trust doctrine thusly:

Because the United States has assumed the trust responsibility for Indian lands and resources that arise out of the cession of millions of acres of Indian land to the United States, this trust responsibility is a shared responsibility. It extends not only to all agencies of the executive branch of our Government, but also to the Congress. And so we must each do our part to assure that the United States' trust relationship with Indian nations and Native Americans is honored.²⁴²

A good deal of the confusion in this area stems from the fact that the phrase “federal trust doctrine” is variously referred to by words and phrases with

²³⁹ David E. Wilkins, *Convolutioned Essence: Indian Rights and the Federal Trust Doctrine*, Native Americans: Hemispheric Journal of Indigenous Issues (Akwe:kon Press, Cornell University 1997){ TA \l "David E. Wilkins, *Convolutioned Essence: Indian Rights and the Federal Trust Doctrine*, Native Americans: Hemispheric Journal of Indigenous Issues (Akwe:kon Press, Cornell University 1997)" \s "Wilkins, Convolutioned" \c 10 } available at <http://nativeamericas.aip.cornell.edu/old/Features/TRUST/Trust.html> (last visited April 22, 2002).

²⁴⁰ E.P. Krauss, *The Irony of Native American "Rights,"* 8 OKLAHOMA L. REV. 447 (1983){ TA \l "E.P. Krauss, *The Irony of Native American "Rights,"* 8 OKLAHOMA L. REV. 447 (1983)" \s "Krauss" \c 10 }.

²⁴¹ Wilkins, *Convolutioned Essence*, *supra* note 239, at 2.

²⁴² United States Senate, Hearing before the Committee on Indian Affairs, 104th Congress, 1st Session, March 20, 1995 (Government Printing Office, 1995){ TA \l "United States Senate, Hearing before the Committee on Indian Affairs, 104th Congress, 1st Session, March 20, 1995 (Government Printing Office, 1995)" \s "United States Senate, Hearing" \c 3 }.

differing meanings attached.²⁴³ For example, trust, trust duty, duty, trust relationship, trust responsibility, trust obligation, substantive duty, specific duty, general duty, trustee-beneficiary, and fiduciary duty are all terms that appear in the literature attempting to give meaning to the concept of the “federal trust doctrine.”²⁴⁴ The creation of this confusion, by the use of differing terms, is not necessarily the fault of the various scholars, legislators, or jurists who employ them; rather, in their articulation of the broad federal trust doctrine, they often are viewing it from one distinct aspect. Thus it is necessary to break down the broader concept into at least three distinct groups: (1) the general trust; (2) a limited or specific trust; and (3) a fiduciary relationship.²⁴⁵ The fiduciary relationship would be the most exacting on the federal government and although the term is used in policy and judicial cases, unless it arises out of a treaty or is enacted as part of a specific statutory responsibility, it seems not to be enforceable as a fiduciary obligation foisted upon the federal government.²⁴⁶

The specific trust relationship arises out of treaties, Executive Orders, and statutes that specifically address Indian tribes and their relationships with the federal government.²⁴⁷ All other responsibilities of the federal government to the tribes can be termed general trust and owe their existence to the historical context of federal-tribal relations as articulated in the Marshall trilogy.²⁴⁸ Regardless of the characterization as general or specific, some argue that agencies exercising discretion in carrying out their statutory duties must comply with this additional obligation imposed on them by the federal trust doctrine.²⁴⁹ Additionally, at least one author advocates, “the general trust responsibility is not necessarily satisfied by compliance with general statutes and may impose a higher duty of protection than statutes may otherwise require.”²⁵⁰

²⁴³ Wilkins, *Convoluted Essence*, *supra* note 239, at 6.

²⁴⁴ As an example see DoD Indian Policy{ TA \s "DoD Indian Policy" }, *supra* note 13, at Section 1 (in the annotated edition of this policy, provided by its drafter to this author, seven of the above terms are used in the same footnote to give meaning to the “federal trust doctrine”).

²⁴⁵ Wilkins, *Convoluted Essence*, *supra* note 239, at 6.

²⁴⁶ See generally, *Seminole v. United States*, 316 U.S. 286, 296-97 (1942){ TA \l "Seminole v. United States, 316 U.S. 286 (1942)" \s "Seminole v. United States" \c 1 }(“Its [federal government’s] conduct...should therefore be judged by the most exacting fiduciary standards.” The court then proceeds to deny the Seminole’s their requested relief).

²⁴⁷ NEJAC, *Guide on Consultation*, *supra* note 19.

²⁴⁸ Wilkins, *Convoluted Essence*, *supra* note 239, at 7.

²⁴⁹ NEJAC, *Guide on Consultation*, *supra* note 19, at 8.

²⁵⁰ Id. See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L REV. 109, 117-21 (1995){ TA \l "Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L REV. 109 (1995)" \s "Wood" \c 10 } (collecting cases and arguing that “[i]nterpreting governmental fiduciary standards as coextensive with express statutory obligations in general laws is inappropriate”). See also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty. The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1513-1522 (1994){ TA \l "Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty*.”

1. Executive Order No. 13175{ TA \s "EO 13175" }

President William J. Clinton signed Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments* on November 6, 2000.²⁵¹ The purpose of Executive Order 13175{ TA \s "EO 13175" } was to “establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal *policies that have tribal implications*, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes.”²⁵² Executive Order 13175 defines “policies that have tribal implications” as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”²⁵³ In formulating or implementing policies that have tribal implications, agencies are to be guided by three fundamental principles:²⁵⁴

1. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.
2. Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian

The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471 (1994)" \s "Mary Wood" \c 10 } (discussing the U.S. Supreme Court's decisions in *Mitchell v. United States*, 445 U.S. 535 (1980) and *Mitchell v. United States*, 463 U.S. 206 (1983); noting that the reason the Court insisted on a specific basis in the "Constitution, statutes, federal regulations, executive orders, or treaties" as a requirement for finding the federal government liable for breach of trust is that these cases involved claims for damages under the Tucker Act, 28 U.S.C. §1491, and the Indian Claims Commission Act, 28 U.S.C. §1505; and arguing that this rationale should not be extended to claims for declaratory and/or injunctive relief under the Administrative Procedure Act, 5 U.S.C. §702).

²⁵¹ Exec. Order No. 13175, *Consultation and Coordination With Indian Tribal Governments*, 65 Fed. Reg. 67249, November 6, 2000 [hereinafter EO 13175{ TA \s "EO 13175" }] available at <http://ceq.eh.doe.gov/nepa/regs/eos/eo13175.html> (last visited April 22, 2002).

²⁵² *Id.* (emphasis added).

²⁵³ *Id.* at Section 1.

²⁵⁴ *Id.* at Section 2.

tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

3. The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Having read the three fundamental principles above, a legitimate question should arise: “what do the first and second principles mean?” After the brief examination of the development of Indian law, one can easily identify various terms used to articulate Tribal sovereignty. In fact, we are in a position to specifically question why, in light of Chief Justice Marshall’s clarification in *Worcester*, the executive order, in articulating fundamental principles, uses the phrase *domestic dependant nations* TWICE! It seems obvious that only the third “principle” actually states a substantive principle. The first and second “principles” only perpetuate the confusion that exists regarding the United States and its “unique legal relationship with Indian tribal governments.”²⁵⁵ Although the fundamental principles may be unclear, the heart of the executive order, Section 5 – Consultation, is clear. It states that consultation with tribal officials shall occur only with reference to “the development of regulatory policies that have tribal implication.”²⁵⁶

2. CEQ Guidance for Cooperating Agency Status

NEPA requires federal agencies to analyze the potential environmental impact likely to result from their proposed projects, activities, and other actions.²⁵⁷ NEPA also requires that federal agencies responsible for preparing NEPA analyses and documentation do so in cooperation with state and local governments and other agencies possessing jurisdiction by law or special expertise related to the proposed undertaking.²⁵⁸ CEQ “cooperating agency” regulations²⁵⁹ implement this requirement, defining a cooperating agency as: “any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the

²⁵⁵ *Id.*

²⁵⁶ *Id.* at Section 5 a.

²⁵⁷ NEPA, *supra* note 11.

²⁵⁸ CEQ, *CEQ Issues Guidance Memorandum on Cooperating Agency Status*, February 5, 2002{ TA \l "CEQ, *CEQ Issues Guidance Memorandum on Cooperating Agency Status*, February 5, 2002" \s "CEQ Guidance Memorandum" \c 3 }, available at <http://www.whitehouse.gov/news/releases/2002/02/20020205-9.html> (last visited April 22, 2002).

²⁵⁹ CEQ has no express regulatory authority under NEPA; instead, CEQ was empowered to promulgate binding regulations by Executive Order 11514, *Protection and Enhancement of Environmental Quality*, March 5, 1970, as amended by Executive Order 11991, 42 Fed. Reg. 26,967 (1977).{ TA \l "Executive Order 11514, *Protection and Enhancement of Environmental Quality*, March 5, 1970, as amended by Executive Order 11991, 42 Fed. Reg. 26,967 (1977)." \s "EO 11514" \c 9 }

human environment. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.”²⁶⁰

On July 28, 1999, George T. Frampton, Jr., then acting Chair of CEQ, issued a memorandum for heads of federal agencies urging them in the future to more actively solicit the participation of state, tribal, and local governments as cooperating agencies in their NEPA process.²⁶¹ Despite this 1999 memorandum and other guidance from CEQ, “some agencies remain reluctant to engage other federal and non-federal agencies as a cooperating agency...[and others] remain reluctant to assume the role...”; thus with this barb, CEQ issued its latest guidance on January 30, 2002.²⁶²

The new memorandum extolled the benefits of stakeholder involvement in environmental decisions including: “disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies’ ability to adopt environmental documents.”²⁶³ The memorandum positioned cooperating agency status as a “major component of agency stakeholder involvement.”²⁶⁴ The major purpose of the memorandum is “to ensure all Federal agencies are actively considering designation of Federal and non-federal cooperating agencies in the preparation of analyses and documentation required by the NEPA, and to ensure that Federal agencies actively participate as cooperating agencies in other agency’s NEPA processes.”²⁶⁵

²⁶⁰ 40 C.F.R. 1508.5.

²⁶¹ CEQ, Memorandum for Heads of Federal Agencies, Designation of Non-federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, July 28, 1999{ TA \l "CEQ, Memorandum for Heads of Federal Agencies, Designation of Non-federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, July 28, 1999" \s "Memorandum for Heads of Federal Agencies" \c 3 }, available at <http://ceq.eh.doe.gov/nepa/regs/guidance.html> (last visited April 22, 2002).

²⁶² CEQ, Memorandum for Heads of Federal Agencies, Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, January 30, 2002{ TA \l "CEQ, Memorandum for Heads of Federal Agencies, Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, January 30, 2002" \s "CEQ, Memorandum" \c 3 }, available at <http://ceq.eh.doe.gov/nepa/regs/guidance.html> (last visited April 22, 2002).

²⁶³ *Id.* at 2.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

On February 4, 2002, CEQ provided this new guidance to all tribal leaders, assuring them that CEQ supports their “involvement in ensuring that decisionmakers have the environmental information necessary to make informed and timely decisions efficiently.”²⁶⁶ CEQ told tribal leaders that “[i]n cases where you have either jurisdiction by law or special expertise you should consider accepting or requesting an invitation to participate in the NEPA process as a cooperating agency. In those cases where cooperating agency status is not appropriate, you should consider opportunities to provide information and comments to the agencies preparing the NEPA analysis and documentation.”²⁶⁷ The memorandum concluded with a reminder “it is important for you to consider your authority and capacity to assume the responsibilities of a cooperating agency and to remember that your role in the environmental analysis neither enlarges nor diminishes the final decisionmaking authority of any agency involved in the NEPA process.”²⁶⁸

CEQ’s guidance to both the heads of federal agencies and to tribal leaders is an important step toward re-invigorating cooperating agency status as part of the NEPA process, but as we will see, it does not go far enough to fully integrate the twin concepts of environmental justice and the federal trust doctrine.

C. Application to the Military

If a DoD agency’s use of its land, withdrawn public land, or of public land administered by a non-DoD agency, may have the potential to significantly affect federally recognized tribes, the DoD agency must consult with the tribe prior to using the land.²⁶⁹ Appendix B provides a general pictorial overview of the national scope of DoD facilities in relation to American Indian and Alaska Native lands.²⁷⁰ DoD has long struggled to strike the correct balance between mission accomplishment and good land stewardship. DoD is truly committed to close cooperation with tribes and is working directly with tribes to address environmental impacts on Indian lands from former DoD activities, such as weapons testing, practice bombing, and field maneuvers, through the Native

²⁶⁶ CEQ, Memorandum for Tribal Leaders, Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, February 4, 2002{ TA \l "CEQ, Memorandum for Tribal Leaders, Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, February 4, 2002" \s "CEQ, Memorandum for Tribal Leaders" \c 3 }{ TA \l "CEQ, Memorandum for Heads of Federal Agencies, Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, January 30, 2002" \s "CEQ, Memorandum" \c 3 }, available at <http://ceq.eh.doe.gov/nepa/regs/guidance.html> (last visited April 22, 2002).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *DoD Indian Policy*, *supra* note 13.

²⁷⁰ American Indian and Alaska Native Lands, available at <https://www.denix.osd.mil/denix/Public/Native/Partnerships/Installations/installations.html> (last visited April 22, 2002).

American Lands Environmental Mitigation Program (NALEMP or Indian Lands Program).²⁷¹

DoD implemented its American Indian and Alaska Native Policy on October 21, 1998.²⁷² The policy begins with a preamble and then describes the following areas: (1) trust responsibilities; (2) government-to-government relations; (3) consultation; and (4) natural and cultural resources protection.²⁷³ The policy clearly delineates DoD interaction with federally recognized tribes whenever DoD's activities may impact them. The policy follows the recommendations of a funded report that reviewed the implications to DoD of recent statutes and regulations affecting Native Americans, their growing political awareness and activism, and the United States military's historical role in Indian affairs.²⁷⁴

In the section on consultation, the *DoD Indian Policy* goes further than is required by Executive Order 13175{ TA \s "EO 13175" }. The Policy requires that all commands "[f]ully integrate (down to staff officers at the installation level) the principle and practice of meaningful consultation and communication with tribes by:

- Recognizing that a unique and distinctive political relationship exists between the United States and the tribes that mandates that, whenever DoD actions may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands, DoD must provide affected tribes an opportunity to participate in the decision-making process that will ensure these tribal interests are given due consideration in a manner consistent with tribal sovereign authority;
- Consulting consistent with government-to-government relations and in accordance with protocols mutually agreed to by the particular tribe and DoD, including necessary dispute resolution processes;
- Providing timely notice to, and consulting with, tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands;
- Consulting and negotiating in good faith throughout the decision-making process; and

²⁷¹ NALEMP Fact Sheet, FY-2000 available at <https://www.denix.osd.mil/denix/Public/Native/native.html> (last visited April 22, 2002).

²⁷² *DoD Indian Policy*{ TA \s "DoD Indian Policy" }, *supra* note 13. The Navy's implementing instruction for the DoD policy is SECNAVINST 11010.

²⁷³ *Id.*

²⁷⁴ David Mitchell and David Rubenson, *Native American Affairs and the Department of Defense*, National Defense Research Institute, RAND (1996),{ TA \l "David Mitchell and David Rubenson, *Native American Affairs and the Department of Defense*, National Defense Research Institute, RAND (1996)" \s "David Mitchell and David Rubenson" \c 10 } available at <https://www.denix.osd.mil/denix/Public/Native/Outreach/Affairs/nat-am-affairs.html> (last visited April 22, 2002).

- Developing and maintaining effective communication, coordination, and cooperation with tribes, especially at the tribal leadership-to-installation commander level and the tribal staff-to-installation staff levels.²⁷⁵

The Policy is intended to provide DoD commanders sufficient guidance in order to fully implement DoD responsibilities regarding actions in Indian Country. However, as the Policy itself acknowledges, the consultation process can vary from simple notice of a pending action to negotiation to obtain the tribe's formal consent (the absence of which may be enough to stop that action from proceeding). The annotated *DoD Indian Policy* helpfully collects the entire range of duties owed to tribes per laws, regulations, and policies and is presented in Appendix C.²⁷⁶

Given this complexity, how is a local commander to know what, if any, action is required? More importantly, does the existing guidance available to the military commander cover all of the requirements of both environmental justice and the federal trust doctrine? As an example, the Navy Policy for Consultation with Federally Recognized Indian Tribes, bases the requirement to conduct consultation on a government-to-government basis on Executive Order 13175{ TA \s "EO 13175" }, which we have seen only requires such consultation when federal agencies are engaged in regulatory formulation and implementation.²⁷⁷ Other valid questions include: "How is a tribal leader to know what to expect from the military commander?" and "What process exists to provide structure to the good will expressed within the *DoD Indian Policy*?"

Answers can be found in the cooperating agency concept.²⁷⁸ As acknowledged in the Navy Consultation Policy, "[p]articipating members of a particular culture are in the best position to provide the most up-to-date and accurate information about that culture; therefore culturally specific information obtained from a member of a particular culture is to be respected as expert testimony."²⁷⁹ Having already been recognized in the Navy Policy as experts, bringing the tribe into the formal process of NEPA is the next logical step. That next logical step, however, is a huge one for many in the military. It is one thing to "consult," when what you mean is to politely listen then go about your normal business. It is quite another thing to formally include a potentially disagreeable

²⁷⁵ *DoD Indian Policy*, *supra* note 13 at Section III.

²⁷⁶ *Id.* (Credit goes to Jim Van Ness, principle author of the *DoD Indian Policy*).

²⁷⁷ SECNAV INSTRUCTION 11010, Department of the Navy Policy for Consultation with Federally Recognized Indian Tribes{ TA \l "SECNAV INSTRUCTION 11010, Department of the Navy Policy for Consultation with Federally Recognized Indian Tribes" \s "SECNAVINST 11010" \c 8 }, available at <http://web.dandp.com/enviroweb/cultural/intro2.html> (last visited April 22, 2002).

²⁷⁸ See *supra* Section III. B. 2.

²⁷⁹ *Id.* at Enclosure (1) No. 6.

group in your formal decision-making process. However, environmental justice properly coupled with the federal trust doctrine requires nothing less.

IV. Synergy Between Environmental Justice and the Federal Trust Doctrine

As previously discussed, Executive Order 12898{ TA \s "EO 12898" } and implementing regulations require an installation commander to analyze the environmental effects, including human health, economic, and social effects of his installation's programs, policies, and activities on minority and low-income populations.²⁸⁰ Implementing guidance in all of the services envision this responsibility as incorporated into the NEPA planning process and advise military commanders to reach out to the local community to identify those agencies and organizations, including tribes, that might represent potentially affected persons.²⁸¹

On the other hand, the *DoD Indian Policy*, Executive Order 13175, or NAGPRA and their { TA \s "EO 13175" } implementing regulations may require an installation commander to formally consult with federally recognized tribes on a government-to-government basis.²⁸² Regardless of whether there is a specific legal requirement to consult, the military commander must execute the mission mindful of the military's obligations under the broader federal trust doctrine and therefore should not treat the tribes as just another special interest group. Under existing guidance can the installation commander faithfully integrate both environmental justice and the federal trust doctrine into his consultation process and still accomplish the military mission?

To illustrate the issue, let us consider the situation at the fictional Naval Air Station Gulf Coast (NASG). Here the installation commander has an outlying airfield used for fifty years by student aviators as an emergency landing field. That mission has been consolidated elsewhere and the outlying airfield is no longer being used for flight training. A subdivision of low-income families borders the property. One corner of the property has for several years been the local gathering point for a sizable homeless population who are served on the site by local relief agencies who provide blankets and food distribution. A federally recognized tribe with historic roots and an ancient burial site on this OLF has its tribal headquarters located on its reservation in Oklahoma, but many of its

²⁸⁰ EO 12898{ TA \s "EO 12898" }, *supra* note 9.

²⁸¹ For an example, see Department of the Air Force, *Interim Guide for Environmental Justice Analysis with the Environmental Impact Analysis Process*, November 1997{ TA \l "Department of the Air Force, *Interim Guide for Environmental Justice Analysis with the Environmental Impact Analysis Process*, November 1997" \s "Department of the Air Force, *Interim Guide*" \c 8 }, available at <https://www.denix.osd.mil/denix/Public/ES-Programs/Planning/Eiap/eiap1.html> (last visited April 22, 2002){ TA \l "https://www.denix.osd.mil/denix/public/es-programs/planning/eiap/eiap1.html" \s "www.denix.osd.mil/denix" \c 11 }

²⁸² See generally Appendix C.

members, including the tribe's traditional religious leader, live in the low-income housing project near the airfield. Each year for as long as anybody can remember, they have, with installation permission, held an annual gathering somewhere on the government's property.²⁸³ The local municipal government has approached the base with the concept of using the property as the location for a new municipal solid waste site. This fits into the long-range plans of the installation since its on-base landfill facility was closed last year. The costs of servicing the installation's solid waste have skyrocketed since the closing. Obviously, there are numerous important environmental and social issues presented in this fact pattern. We will consider two of them.

A. Does Environmental Justice Detract from the Military's Responsibilities Under the Federal Trust Doctrine?

In viewing these complex issues, it is important again to recognize the different groups potentially affected by this action. It is equally important to recognize the two concepts at issue – environmental justice and the federal trust doctrine. Environmental justice demands equality;²⁸⁴ the federal trust doctrine demands special treatment for a distinct group based upon their political sovereignty. Here the distinct group (the tribe) is also part of a minority and low-income population. Approached from the perspective of a minority population, the concept of environmental justice addresses all of the concerns raised in our scenario: public notice, education, and participation in defining the project's location, scope, and possible mitigation. All of this focuses on ensuring the affected minority population does not bear a disproportionate amount of the locality's pollution. Environmental justice mandates that the installation commander consider the adverse impacts the proposed project may have on minority or low-income populations adjacent to the installation, thereby ensuring their interests are as equally protected as those of the population at large. The process, when done sincerely, integrates the often marginalized into the mainstream, seeking to create equal protection under law.

However, from the tribal perspective, the environmental justice approach trivializes their historic struggle to remain a people apart – a distinct people within the United States, free to control their own future with their own laws and customs. Environmental justice equates Indian interests as just another special interest group at the public forum. Viewed thusly, environmental justice is the antithesis of the federal trust doctrine.

²⁸³ For purposes of this illustration, none of the property in question is subject to tribal claim by treaty or otherwise.

²⁸⁴ Here, equality should not be confused with affirmative action (special treatment for a distinct group to correct past wrongs). Equality provides all equal access to the table.

B. Does Environmental Justice Increase The Military's Responsibilities Under the Federal Trust Doctrine?

Our installation commander is not without guidance for this scenario. He knows that issues affecting the trust responsibility owed to federally recognized tribes require government-to-government consultation. The first question then should be: “is there a trust responsibility?” Relying on the *DoD Indian Policy*, the installation commander must determine whether the proposed action “may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.”²⁸⁵ How is the installation commander to answer this question without tribal input? Let us assume our commander does contact the tribal government in Oklahoma and they express no opposition to the project, but acknowledge that the traditional religious leader locally maintains the oral tradition and history of the affected land. Having consulted with and secured no opposition from the designated tribal officials of the federally recognized tribe, our commander has fulfilled his obligations under the *DoD Indian Policy*.²⁸⁶ But for the environmental justice issue, there might be no meaningful outreach to the local Indian community. Since the *DoD Indian Policy* requires consultation with federally recognized tribes through their tribal governments, it does not officially address situations where tribal governmental decisions are not reflective of the desires of all of the members of the tribe.²⁸⁷ Here, environmental justice provides an avenue for affected tribal members to be heard and to participate notwithstanding their tribe’s official policy.

C. Requiring Cooperating Agency Status for Tribes

As indicated in CEQ’s letter to federal agencies, “it is incumbent on Federal agency officials to identify as early as practicable in the environmental planning process those Federal, State, Tribal and local governmental agencies that have jurisdiction by law and special expertise with respect to all reasonable alternatives or significant environmental, social or economic impacts associated with a proposed action that requires NEPA analysis.”²⁸⁸ CEQ provides twelve factors for determining whether to invite, decline or end cooperating agency status.²⁸⁹ Factors two and five are especially helpful given our above scenario.²⁹⁰

²⁸⁵ *DoD Indian Policy* *supra*, note 9.

²⁸⁶ Here we are referring to the broad general trust obligation vice a specific duty that may be raised by statute. For example, consultation with the local tribal religious leader may be required under the Native American Graves Protection and Repatriation Act §7, but that discussion is beyond the scope of this paper; it does however illustrate the legal complexity of tribal issues.

²⁸⁷ NEJAC, *Guide on Consultation*, *supra* note 19, at 19. NEJAC states that, “[a]gencies should not be surprised to learn that the interests of traditional leaders and cultural authorities do not always coincide with those of the tribal government.” *Id.*

²⁸⁸ CEQ, Memorandum *supra* note 261 at 2.

²⁸⁹ *Id.* at Attachment 1.

²⁹⁰ *Id.* All twelve factors are provided at Appendix D.

Inviting the tribe and its religious leader to participate as a cooperating agency allows the installation commander to successfully integrate environmental justice and the federal trust doctrine while learning valuable information about the effect of the proposed project on the land and how best to mitigate that effect.

The policy change required to address both environmental justice and the federal trust doctrine can occur in one of two ways: (1) DoD can amend the current *DoD Indian Policy* to require the invitation of federally recognized tribes to join in the NEPA process as a cooperating agency or (2) CEQ can amend its regulations to eliminate the technically narrow application of cooperating agency to tribes (only if the effect is on a reservation) and instead require all federal agencies to invite the participation of federally recognized tribes as cooperating agencies whenever a proposed major federal action has the potential to significantly affect protected tribal resources, tribal rights, or Indian lands. The latter implementation is preferred since it would have a broader scope applicable to all federal agencies, not just DoD, and could be accomplished by making the proposed changes to the cooperating agency sections in the CEQ regulations²⁹¹ contained in Appendix E. DoD should not, however, wait for the change, but instead should lead the way by reaching out to Indian tribes through the cooperating agency process.

V. Conclusion

Can environmental justice, with deep roots in the struggle of a formally enslaved people to achieve civil rights, integration, and governmental equality *and* the federal trust doctrine, with deeper roots in the struggle of a free people to remain separate and apart, successfully co-exist in the context of federal agency decision-making? If taken to the extreme, environmental justice has the potential to undue the federal trust doctrine by undermining the legitimate decisions of tribal leaders operating according to their own laws. At its very core, environmental justice demands equality, not deference to governmental decision-makers, regardless as to whether those governments are federal, state, or tribal. On the other hand, environmental justice does offer tribal members the same opportunities as those in the community at large in understanding the scope of a proposed federal action and to participate in the decision-making process over actions that may negatively impact their individual communities and health. It offers the promise of a government making environmental decisions in the open after seeking input and cooperation of its citizens – all of its citizens.

DoD has taken the necessary first step to recognize tribal concerns in the NEPA process. It is now time to take the next logical step by formally integrating affected tribes as cooperating agencies within the framework of the NEPA

²⁹¹ 40 C.F.R. Parts 1500-1508 (1992).

process. By embracing, rather than resisting, the inclusion of tribes as cooperating agencies, the military will enhance the scoping phase of NEPA, learn of potential cost effective mitigation early, and prevent tribal opposition based on lack of information and stakeholder interest in the proposed project. Additionally, such a policy change would perfectly blend the twin concepts of environmental justice and the federal trust doctrine.

DoD's current policy should be amended to require installation commanders to invite the participation of a federally recognized tribe to join as a cooperating agency whenever a proposed action has the potential to significantly affect such tribe. DoD has the opportunity to lead the way among its sister federal agencies by incorporating the spirit and intent of CEQ's cooperating agency regulation instead of hiding behind its current technically limited application.²⁹² Regardless of whether DoD leads the way, CEQ should adopt the changes proposed in Appendix E and make the application of cooperating agency status a requirement when the proposed action has the potential to significantly affect a tribe, thus truly integrating tribal concerns and solutions within the NEPA process. If environmental justice and the federal trust doctrine are to be more than good will gestures on the part of the United States government towards tribal governments, their implementation requires a structured process that allows for meaningful input and participation by potentially affected tribes.

The regulation and policy changes proposed, in combination with a proper understanding of environmental justice and the federal trust doctrine, will provide federal agencies and the various federally recognized tribes the structure required to successfully integrate the two concepts into any real-world scenario. Concluding with our installation commander, it is imperative that all such officials know their communities and the special populations that may be affected by the actions of their installations. Strong community ties *before* a proposed action is undertaken is critical. By dealing with Indian tribes as cooperating agencies during their NEPA process and by understanding the synergy between environmental justice and the federal trust doctrine, local commanders will successfully navigate the potentially hazardous waters of implementing these two complex legal concepts.

²⁹² 40 C.F.R. §1501.6 & §1508.5.

Appendices

Historical Development of the Federal-Tribal Relationship

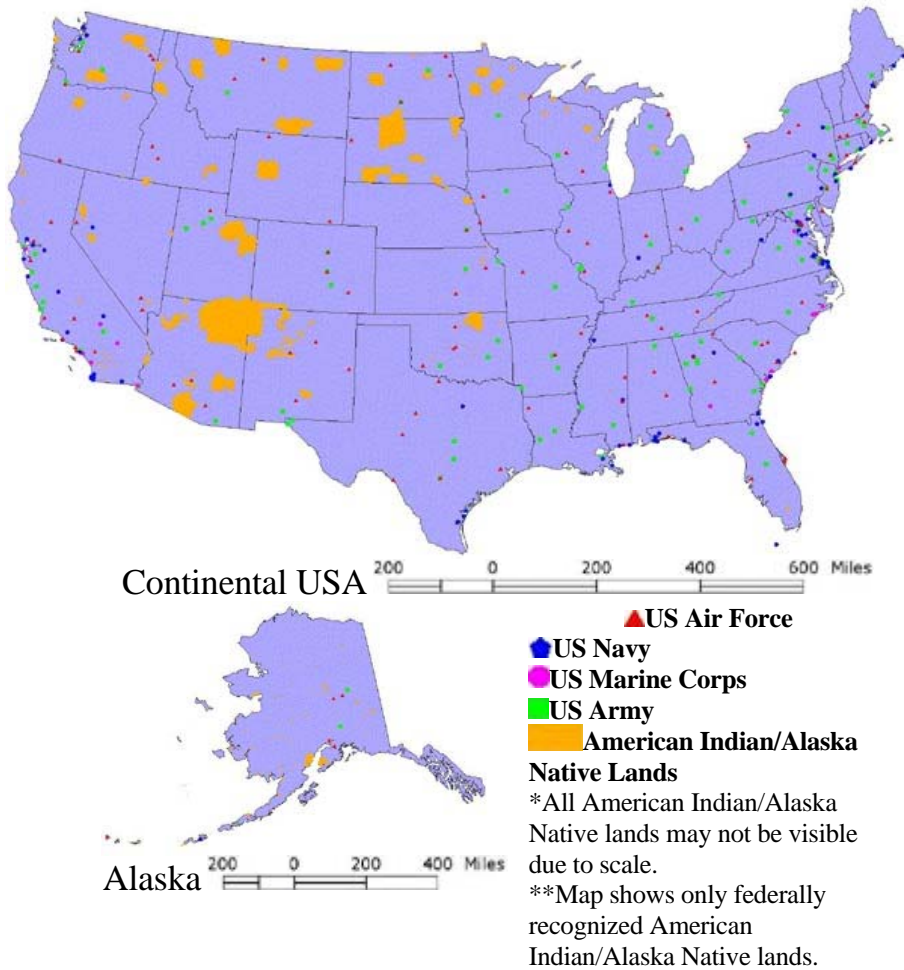
<i>Dates</i>	<i>Policy</i>	<i>Major Laws</i>	<i>Relationship</i>	<i>Tribes' Status</i>	<i>Tribal Responses</i>
1770s-1820s	International sovereign to International sovereign	1787 Northwest Ordinance 1790 Trade & Intercourse Act treaties	Protectorate	International sovereigns	Diplomacy, some armed resistance
1830s-1850s	Removal	1830 Indian Removal Act treaties	Government-to-government and trust relationship	Domestic	Armed resistance; negotiation under duress
1850s-1890s	Reservation	Reservation treaties	Guardianship	Wards in need of protection	Waning resistance; accommodation
1870s-1930s	Assimilation	1871 End of treaty making 1885 Major crimes act 1887 Allotment Act (Dawes Act)	Guardianship	Wards in need of protection	Accommodation; foot dragging; religious movements
1930s-1950s	Indian self-rule	1934 Indian Reorganization Act (Wheeler-Howard Act)	Renewal of government-to-government and trust relationship	Quasi-sovereigns	Increased political participation; growing intertribal activity
1950s-1960s	Termination (assimilation)	1953 Resolution 108 1953 Public Law 280 Urban Relocation Program	Termination of trust relationship	Termination of quasi-sovereign status	Growth of intertribal politics; beginnings of modern resistance

Sources: Modified from Sharon O'Brien, *American Indian Tribal Governments* (Univ. of Oklahoma Press, 1989), 258; Stephen Cornell, *The Return of the Native* (Oxford University Press, 1988), 14.

<i>Dates</i>	<i>Policy</i>	<i>Major Laws</i>	<i>Relationship</i>	<i>Tribes' Status</i>	<i>Tribal Responses</i>
1960s-1988	Self-determination	1968 Indian Civil Rights Act 1975 Indian Self- Determination Act 1978 Indian Child Welfare Act 1978 Indian Religious Freedom Act	Renewal of government-to-government and trust relationship	Domestic dependent nations/quasi-sovereigns	Continued spread of political activity; radical activism until 1970s.
1988-Present	Self-determination/ Self-governance	1988 Indian Gaming Regulation Act 1988 Tribal Self-Governance Act 1990 Native American Graves Protection and Repatriation Act 1994 Indian Self-Determination Act 1996 Native American Housing Assistance Act 2000 Indian Tribal Economic Act	Government-to-government and trust relationship	Domestic dependent nations/quasi-sovereigns	Interest-group activity; increase of international activity



American Indian and Alaska Native Lands
Near U.S. Military Installations



Trust Matrix	WHEN THE DUTY APPLIES
<p>Trust Responsibility:</p> <ul style="list-style-type: none"> • Protect "to the highest degree of fiduciary standards" trust lands and water and land habitats that support meaningful exercise of off-reservation hunting, fishing, and gathering rights • Where trust responsibility applies, Indian interests cannot be subordinated to interests of the DoD absent overriding legal authority to do so 	<ul style="list-style-type: none"> • Proposed action may affect* trust lands <p>Trust lands are:</p> <ol style="list-style-type: none"> 1) tribally owned lands held in trust by the federal government; and 2) allotted lands owned by individual Indians but held in trust by the federal government; and 3) restricted fee allotments <ul style="list-style-type: none"> • Proposed action may affect* <u>off-reservation treaty rights</u> <p>**off-reservation treaty rights are those use and occupancy rights reserved for Indians in a treaty, statute, or Executive Order establishing a reservation.</p> <p>* even actions on DoD or other non-Indian-owned lands may affect trust land or off-reservation treaty rights and be conditional by the trust responsibility.</p>
<p>Obtain Consent from Indian Tribe:</p>	<ul style="list-style-type: none"> • Prior to issuing an ARPA permit on Indian lands. 16 USC 470cc (g)(2) [ARPA §4] • When determining disposition of archeological items that are moved from Indian lands. 16 USC 470dd (2) [ARPA §5] <p>Before removing Native American human remains or cultural items from tribal lands. 25 USC 3002(c)(2) [NAGPRA §3]</p>
<p>Consult with Indian Tribe:</p>	<ul style="list-style-type: none"> • Prior to completing inventories of Native American human remains and associated funerary objects in an agency's possession. 25 USC 3003 (b)(1)(A) [NAGPRA §5] • Determining the cultural affiliation of unassociated funerary objects, sacred objects, and objects of cultural patrimony. 25 USC 3004(b)(1)(B) [NAGPRA §6] • Determining how to return cultural items or human remains. 25 USC 3005(a)(3) [NAGPRA §7]

	<ul style="list-style-type: none"> • Clarifying agency's NHPA responsibilities where Indian tribe or Native Hawaiian organizations attaches religious cultural significance to register-eligible site. 16 USC 470a(d)(6)(B) [NHPA] • When agency's preservation work may affect tribal concerns. 16 USC 470h-2 (a)(2)(D) [NHPA] • Deciding how to deal with adverse effects of federal undertakings on register-eligible properties. 16 USC 470h-2 (a)(2)(E)(ii) [NHPA] • During development of regulatory policies that significantly or uniquely affect Indian communities. E.O. 13084, 14 May 1998, Sec. 3 • Before taking actions that will affect federally recognized tribal governments. Executive Memorandum, 29 April 1994, Section (b) • Dealing with access, use, and protection of sacred sites. E.O. 13007, 24 May 96, Section 2(b) (iii)
--	--

<p>Consult with Indian Tribe (continue): National Environmental Policy Act and CEQ Regulations</p>	<ul style="list-style-type: none"> • Invite affected Indian tribe to participate in scoping. 40 CFR 1501.7 (a)(1) • Invite comments on draft EIS 40 CFR 1503.1 (a)(2)(ii) • May request Indian tribe to become a cooperating agency when proposal may affect trust lands or treaty rights. 40 CFR 1508.5
<p>Notify Indian Tribes:</p>	<ul style="list-style-type: none"> • Prior to issuing an ARPA permit for work that may harm a religious cultural site. 16 USC 470cc (c) [ARPA §4] • After completing NAGPRA-required inventories of Native American human remains and associated funerary objects. 25 USC 3003(d) [NAGPRA §5] • When "summarizing" inventory of unassociated funerary objects, sacred objects, and objects of cultural patrimony. 25 USC 3004(a) [NAGPRA §6] • Prior to taking an action that may restrict access to or use of or affect the physical integrity of sacred sites. E.O. 13007, 24 May 96, Section 2(a)
<p>National Environmental Policy Act and CEQ Regulations</p>	<ul style="list-style-type: none"> • Provide notice of hearings, meetings, and availability of documents when proposal may affect trust lands or treaty rights. 40 CFR 1506.6 (b)(3)(ii)

**Factors for Determining Whether to Invite, Decline or End
Cooperating Agency Status**

1. Jurisdiction by law (40 C.F.R. § 1508.15) – for example, agencies with the authority to grant permits for implementing the action [federal agencies shall be a cooperating agency (1501.6); non-federal agencies may be invited (40 C.F.R. § 1508.5)]:
 - Does the agency have the authority to approve a proposal or a portion of a proposal?
 - Does the agency have the authority to veto a proposal or a portion of a proposal?
 - Does the agency have the authority to finance a proposal or a portion of a proposal?
2. Special expertise (40 C.F.R. § 1508.26) – cooperating agency status for specific purposes linked to special expertise requires more than an interest in a proposed action [federal and non-federal agencies may be requested (40 C.F.R. §§ 1501.6 & 1508.5)]:
 - Does the cooperating agency have the expertise needed to help the lead agency meet a statutory responsibility?
 - Does the cooperating agency have the expertise developed to carry out an agency mission?
 - Does the cooperating agency have the related program expertise or experience?
 - Does the cooperating agency have the expertise regarding the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?
3. Do the agencies understand what cooperating agency status means and can they legally enter into an agreement to be a cooperating agency?
4. Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?
5. Can the cooperating agency, in a timely manner, aid in:
 - identifying significant environmental issues [including aspects of the human environment (40 C.F.R. § 1508.14), including natural, social, economic, energy, urban quality, historic and cultural issues (40 C.F.R. § 1502.16)]?
 - eliminating minor issues from further study?
 - identifying issues previously the subject of environmental review or study?

- identifying the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?
(40 C.F.R. §§ 1501.1(d) and 1501.7)
6. Can the cooperating agency assist in preparing portions of the review and analysis and resolving significant environmental issues to support scheduling and critical milestones?
 7. Can the cooperating agency provide resources to support scheduling and critical milestones such as:
 - personnel? Consider all forms of assistance (e.g., data gathering; surveying; compilation; research.
 - expertise? This includes technical or subject matter expertise.
 - funding? Examples include funding for personnel, travel and studies. Normally, the cooperating agency will provide the funding; to the extent available funds permit, the lead agency shall fund or include in budget requests funding for an analyses the lead agency requests from cooperating agencies. Alternatives to travel, such as telephonic or video conferencing, should be considered especially when funding constrains participation.
 - models and databases? Consider consistency and compatibility with lead and other cooperating agencies' methodologies.
 - facilities, equipment and other services? This type of support is especially relevant for smaller governmental entities with limited budgets.
 8. Does the agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses? For example, are either the lead or cooperating agencies unable or unwilling to consistently participate in meetings in a timely fashion after adequate time for review of documents, issues and analyses?
 9. Can the cooperating agency(s) accept the lead agency's final decision-making authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?
 10. Are the agency(s) able and willing to provide data and rationale underlying the analyses or assessment of alternatives?

11. Does the agency release predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents? Disagreeing with the published draft or final analysis should not be a ground for ending cooperating status. Agencies must be alert to situations where state law requires release of information.
12. Does the agency consistently misrepresent the process or the findings presented in the analysis and documentation?

**Proposed Changes to CEQ Regulations Fully Implementing
Cooperating Agency Status to Indian Tribes**

Sec. 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency. A federally recognized Indian tribe shall, upon request of such tribal government to the lead Agency, be designated a cooperating agency if the proposed major federal action has the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.

(a) The lead agency shall:

1. Request the participation of each cooperating agency in the NEPA process at the earliest possible time.
2. Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.
3. Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

1. Participate in the NEPA process at the earliest possible time.
2. Participate in the scoping process (described below in Sec. 1501.7).
3. Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.
4. Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.
5. Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

- (c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or

Sec. 1503.1 Inviting comments.

- (a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:
 - 1. Obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.
 - 2. Request the comments of:
 - (i) Appropriate state and local agencies which are authorized to develop and enforce environmental standards;
 - (ii) Indian tribes, if the proposed major federal action has the potential to significantly affect protected tribal resources, tribal rights, or Indian lands; and
 - (iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

- 3. Request comments from the applicant, if any.
- 4. Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.
- (b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under Sec. 1506.10.

Sec. 1506.6 Public involvement.

Agencies shall:

- (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.
- (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.
 - In the case of an action with effects primarily of local concern the notice may include:
 - (i) Notice to state and area-wide clearinghouses pursuant to OMB Circular A- 95 (Revised).
 - (ii) Notice to Indian tribes when the proposed major federal action has the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.
 - (iii) Following the affected state's public notice procedures for comparable actions.

Sec. 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in Sec. 1501.6. [[A federally recognized Indian tribe shall, upon request of such tribal government to the lead Agency, be designated a cooperating agency if the proposed major federal action has the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.]] A State or local agency of similar qualifications may by agreement with the lead agency become a cooperating agency. Conflicts relating to the designation and acceptance of cooperating agency status shall be referred to the Council for resolution.

IS JIHAD A JUST WAR? WAR, PEACE, AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW

by Hilmi M. Zawati

2001 The Edwin Mellen Press, Lewiston, NY, USA

Lieutenant Commander Gregory P. Noone, JAGC, USNR¹

When suicide-murderers hijack planes and kill thousands of innocent civilians simply because they went to work on time that morning, as well as the hundreds of travelers on those planes who were off on vacation, a business trip, or starting a new life on the other side of our country - we ask why would they do this? The answer most often heard is Islamic "Jihad" or "Holy War." We know these men had nothing but evil intentions and hopes of killing as many Americans as possible. We know they were part of and financed by the al Qaeda terrorist network and their leader Osama bin Laden. It is clear to us now that we have been in a "war" with this organization and others like it since the 1983 bombings of the US embassy and the US Marine barracks in Lebanon. This non-traditional war has raged overseas for nearly two decades at the Khobar Towers, the US embassies in Kenya and Tanzania, the USS Cole, and countless other plots that were thwarted or failed. It came to our shores in the early 1990's as they attempted to destroy the foundation of one World Trade Center tower with a truck bomb hoping that it would fall over and take the other tower with it. All of which comes back to the most basic question of "why?" and the answer we receive time and again is "Jihad."

Is Osama bin Laden evil incarnate to the western world but a true warrior and a beacon of hope to Muslims? Or is he a mere symbol of, or viewed as the

¹ Lieutenant Commander Gregory P. Noone, JAGC, USNR, (B.A. in Political Science from Villanova University 1987, J.D. from Suffolk University Law School 1990, M.A. in International Affairs from The Catholic University of America 2002) is currently assigned to Office of the Judge Advocate General, United States Navy, International and Operational Law Division Reserve Unit, in Washington D.C. LCDR Noone is a Training Program Officer in the Training Department of the United States Institute of Peace. USIP is an independent, nonpartisan federal institution created by the U.S. Congress to promote research, education, and training on the prevention, management and peaceful resolution of international conflicts. LCDR Noone is also an adjunct professor at Roger Williams University School of Law where he teaches International Law, US Military Law and Legal Policies, and Genocide in the 20th Century. Dr. Diana C. Noone and LT De Andrea Fuller, JAGC, USN edited this book review.

only alternative, to the oppressed Islamic people in various non-democratic regimes? Or is he a sophisticated thief posing as a “Islamic fundamentalist” terrorist, like the ones in the first *Die Hard* movie who’s main objective was the money in the building’s basement vault, hoping to de-stabilize Saudi Arabia so that bin Laden may one day reap the benefits of controlling one-third of the world’s oil?

In analyzing bin Laden’s motivations and objectives, the news media, the so-called experts, and the man on the street in both the west and the Islamic world all speak of jihad. Whether bin Laden and al Qaeda are undertaking a jihad (proper or otherwise) against the west, and the United States in particular, is not the subject of author Hilmi Zawati’s pre-September 11th book. However, it is important to understand the basis for this relevant concept of jihad as well as how jihads are viewed by the Muslim world. However, westerners generally have limited knowledge or contact with Islam. Today if you asked the average American to define a jihad most would associate it with terrorism and a negative perception of Muslims and Islam itself.

Author Hilmi Zawati’s central focus of *Is Jihad a Just War?* is to refute such notions about Jihads and to educate the reader on what he calls “Islamic international law.” Zawati undertakes a comparative analysis of generally accepted (i.e. western) public international law with special attention paid to human rights and the laws of armed conflict and their historical development with relation to Islamic international law and its evolution.

Zawati starts with the premise that “[t]he word Jihad may be one of the most misinterpreted terms in the history of Islamic discourse” and that it is now “virtually synonymous in the public mind with terrorism.” His chief aim is to “counter the distorted image of Jihad and to demonstrate that Jihad is a just, defensive and exceptional form of warfare” designed to bring about peace and protect human rights regardless of sex, language, race, or religion. Zawati states that there is no evidence of any Islamic law that instructs Muslims to kill non-Muslims and that a “jihad is not to force unbelievers to embrace Islam.”

The “classical sources of Islamic legal theory” maintain jihad is lawful warfare “waged to defend the freedom of religious belief for all humanity, and constitutes a deterrent against aggression, injustice and corruption.” War in Islam is strictly prohibited unless responding to aggression and therefore is defensive only. The Holy Qur’an states “Allah loveth not transgressors.” However, the author does concede that Muslims have waged unjust wars but that was due to Muslim commanders and not within “the norms of Islamic law.” Author Zawati asserts Islamic international law “regulates conduct during jihad on the basis of certain humane principles” and draws “a clear and firm distinction between

combatants and noncombatants in time of war.” The author also insists that waging jihad is strictly forbidden “until all peaceful options have been exhausted.” In fact, on the battlefield, Muslim soldiers are prohibited from initiating the conflict and can only wage jihad in defense of their faith and land after they have called on their opponent to convert to Islam or conclude a peace covenant.

Zawati maintains that jihad technically means to exert one’s power and capacity (generally against evil) to the best of one’s capabilities and it is the duty of every healthy, mature, and capable Muslim male. However, only an Imam or a Caliph (who is the head of the Muslim state), and not the public, may declare a jihad. There are two types of jihad: “the moral struggle ([the] greater jihad) and the armed struggle ([the] lesser jihad).” The first, or the greater jihad, is an internal struggle “against the self and evil” and is performed by the heart. Whereas, the second, or the lesser jihad, is armed struggle against Muslim dissidents, highway robbers, apostates, rebels and unjust rulers or against non-Muslims. Most scholars agree that the greater jihad must be undertaken first before the lesser jihad may occur. With that said, there is only one armed jihad that is acknowledged by Islamic law and that is “the defensive one” whether it is waged on Muslim soil following an attack or abroad. It is here that Zawati notes that under public international law the Geneva Conventions rules relating to international armed conflict are stronger than those relating to non-international armed conflict. Whereas, under Islamic international law the reverse is true which therefore means that Muslims on the receiving end of a lesser (or armed) jihad will be treated more humanely than non-believers.

The author argues that the “external” lesser jihad against non-Muslims may only be a defensive war and may not be waged unless Muslims are attacked or the non-Muslims have committed a breach in their conduct towards the Muslims. The author refutes those that proclaim, “no compromise is permitted with those who fail to believe in God [Allah], they have either to accept Islam or fight[.]” Zawati does so by relying on the Holy Qur’an and Muhammad’s teaching that state: “Let there be no compulsion in religion.” Zawati also points out where the Holy Qur’an directs that there shall be no disputes with the “People of the Book” (i.e. Jews and Christians). The author maintains that under Islamic international law “the People of the Book” have “a respected position and special status” and Muslims are “ordered by the Holy Qur’an to treat them and argue with them gently.”

Zawati goes on to write that a jihad is used to “defend Muslims against real or anticipated attacks; to guarantee and extend freedom of belief; and to defend the mission of Islam.” However, under Islamic law, as written in the Holy Qur’an, no one is ever to be killed for being a non-Muslim who refuses to convert to Islam. Zawati also refutes current western literature that describes the jihad as a

“holy war” for two reasons. First, Islamic law has no separation between the Islamic religion and the Islamic state and therefore jihads are not necessarily based on religious reasons. Second because there is “no resemblance between the concept of jihad” and the “Christian concept of crusade.” The first point is well taken but the author’s second point is evidence of where his reasoning at times throughout this book comes up empty. Zawati will back up assertions such as this by quoting another author or scholar but not fully fleshing out why they have made such an assertion or why they may or may not be correct.

At other times however, the author cannot seem to get past some apparent differences in interpretation of Islamic law that confuses westerners unfamiliar with Islam and allows those with hatred as an agenda to warp this religion’s lessons. Author Zawati, as evidenced below, undertakes to describe the noble history of jihad as well as the Muslim view of the world. But the assertions he makes in each case seem to reflect the view that it is “Muslims against the infidels.” Zawati appears to contradict his main theme that the west’s opinions of Islamic jihads are distorted because they are only “just” undertakings that benefit all human beings. First the author examines the verses of the Holy Qur’an in order to relate the concept of jihad’s four stages of historical evolution. The first stage in development forbade Muslims to fight and emphasized the non-violent greater jihad. In the second stage, the prophet Muhammad preached outside of Mecca and Muslims were given permission to fight those who have wronged Allah. In the third stage Muslims were given the order to fight “just” battles in the cause of Allah but not transgress limits. In the final stage, Muslims received the order to battle polytheist (including the “People of the Book”) if they do not acknowledge Allah as the “religion of truth” and willingly submit. Zawati then explains that Muslim jurists divide the world into three realms of existence (these are not geographic distinctions) in relation to jihad theory. There is the territory of Islam (*dar al-Islam*), the territory of the covenant (*dar al-‘ahd*), and the territory of war (*dar al-harb*). Some jurists maintain that a non-Muslim state that respects Muslims and guarantees the freedom of religion “should not be considered *dar al-harb*.” However, the author readily admits that a “majority of jurists classify a country as *dar al-Islam* or *dar al-harb* according to the prevalence or absence of Islamic law[.]”

Zawati then discusses how a jihad may be terminated in one of four ways: (1) the non-Muslim enemy surrenders and embraces Islam; (2) defeat of the enemy; (3) a cessation of hostilities with neither side victorious; (4) a peace treaty or armistice. The treaty must be concluded by an “Imam or his representative; it should serve the interests of the Muslim community; it must not include invalid provisions, such as returning the women of the enemy who have converted to Islam; and finally, the treaty must be concluded for a definite period of time” generally not to exceed four months except when absolutely necessary, but

renewable if Muslim forces are not yet strong enough to launch another jihad. It is noted that these avenues of termination of warfare share some common features with public international law except that Muslims exclude the possibility of their defeat as a means of termination.

The author is even on firmer footing when he endeavors to detail the Islamic international law as it relates to the law of armed conflict and human rights. Muslim jihadists are to follow strict humane rules while in armed conflict regarding their behavior and the treatment of enemy persons and property. Islamic international law distinguishes between combatants and civilians, military and civilian objects, and limits violence to only what is necessary in fighting the war. The Muslim fighter is forbidden from the following acts with respect to combatants: (a) beginning any war without first inviting the enemy to convert to Islam or conclude a peace treaty and they are prohibited from initiating any armed conflict until the enemy attacks; (b) summary executions and torturing of prisoners of war; (c) killing the wounded and enemy *hors de combat*; (d) mutilating dead bodies; (e) treachery and perfidy; and (f) using poisoned weapons or “weapons of mass destruction.” The Muslim fighter is forbidden from the following acts with respect to civilians / noncombatants: (a) attacking, molesting and killing them (this category includes women, old men, children under 15 years of age, diplomats, merchants, peasants, monks, and sick and disabled persons); (b) rape and sexual molestation; (c) massacres and ethnic cleansing.

The Holy Qur’an states that Muslims should not take another’s life unless justified nor should you kill yourself. “Islamic humanitarian law guarantees fair treatment of civilians who have not engaged in war, and prohibited random use of weapons in a manner that would affect warriors and civilians indiscriminately.” The author exhibits verses from the Holy Qur’an as well as centuries old dispatches from Muslim Caliphs and military leaders expressly prohibiting the killing of civilians and their crops. Islamic law also requires that non-Muslim traditions, customs and places of worship shall be respected in times of peace and war. If these places are destroyed or damaged they should be repaired and rebuilt. In accordance with Islamic humanitarian law and under the doctrine of jihad all “personal individual rights, for all people, without distinction as to race, sex, language or religion” are protected and affirmed.

Interesting to note, Zawati argues that Islamic international law was centuries ahead of the west in establishing rape as a war crime when committed during armed conflict, as well as the protection of religious, medical and cultural institutions. As an aside, the author also maintains Muslims were hundreds of years ahead in their use of military field hospitals. Zawati also asserts that Islamic law has contributed greatly to the development of public international law but that Western jurists marginalized Muslim contributions out of vanity and religious

prejudice. Zawati may have a point because the Islamic principles of a jihad are very similar to the generally accepted western principles of a just war including the concepts that a just war must be a last resort (all peaceful options must be exhausted before the use of force can be justified), it may only be waged by a legitimate authority, fought only as self-defense against armed attack or to redress a wrong, and civilians must not be targets of the fighting and great care must be taken to avoid civilian casualties. The author also maintains that Islamic international law protecting personal, economic, and judicial rights of civilians during armed conflicts predates the 1948 Universal Declaration of Human Rights by fourteen centuries and the writings of the generally accepted “father” of international law, Dutch jurist Hugo Grotius, by eight centuries.

In another section of the book the author sets out to ensure that the reader understands that Islamic law is more than religious rules and regulations. Islamic law is a “comprehensive legal system styled to preserve the interests of Muslims and to regulate their relations with the rest of the world in times of peace and war.” Islamic international law enforces the respect of treaties, for example, peace treaties as well as those made centuries ago with the crusaders for release of prisoners of war whether by exchange or for payment. The principle of reciprocity is also prevalent in Islamic international law and its rules for armed conflict whereby “Muslim jihadists are bound in their actions by the conduct of the enemy.” In fact, Zawati claims that Muslims will not undertake reprisals during conflict and will “not exceed the bounds of human decency.” Islamic international law is essentially the same as public international law in the areas of arbitration, neutrality, foreign trade, and diplomatic exchange and immunity.

The author hopes that his effort makes it evident that jihad “in the form of armed struggle, must be just in its causes, defensive in its initiative, decent in its conduct and peaceful in its conclusion.” Perhaps the July 2002 United States Institute of Peace Special Report on Islamic Extremists offers the best view of the current day jihad when it states that “[r]eligion is more of a garb than a guide to action.” However, the report continues, most Muslims are in fact peaceful and any “stereotyped images of Islam as a monolithic religion predisposed to violence” does not “take into account the multi-faceted complexity of those Islamic groups that choose violence as a political strategy.”

It is clear, although the author does not specifically state it in this pre-September 11th book, that several organizations, al Qaeda in particular, are not undertaking a proper jihad in accordance with Islamic law. The indiscriminate killing of civilians – especially women and children, the attack of non-military objects in New York City (one could possibly argue that the Pentagon may be a lawful target during an armed conflict but certainly the method of attack was unlawful), their desire to use biological, chemical, and nuclear weapons of mass

destruction, as well as the summary execution of a prisoner of war as evidenced by their killing of the US Navy SEAL (First Class Petty Officer Neil Roberts, USN) after he fell from his helicopter and was captured in March 2002 in Afghanistan, are all prohibited acts in a jihad under Islamic international law. Even their most basic method of carrying out their unlawful attacks – murder by suicide – violates the rules of jihad and is counter to the teachings of the Holy Qur'an.

Is Jihad a Just War? is an interesting and well-researched book. Any scholar undertaking a history of or a study of comparative international law and especially the law of armed conflict should include this work in their research. There are scores of bibliographical sources and useful footnotes. It is crucially important that we try to understand more than our own western views and begin studying Islamic law and legal theory. However, this author clearly has an agenda as he sets out to bolster Islamic law. Zawati is often too quick to conclude that Islamic law is better and more effective than western legal thought as well as richer in its historical roots and traditions. Structurally, Zawati appears to contradict himself at times, and he could use more focus on his organization in order to express himself more clearly in his arguments. However, the author largely accomplishes what he set out to do which was to provide a helpful historical, legal, and thought provoking book for those who are trying to understand Islamic law and the concept of jihad.

MILITARY BRATS AND OTHER GLOBAL NOMADS: GROWING UP IN ORGANIZATIONAL FAMILIES

*Edited by Morten G. Ender
2002 Praeger Publishers, Westport, CT, USA*

Dr. Diana C. Noone¹

Military life's hardest challenges occur during deployments and overseas duty assignments. A judge advocate's duties will often times put him or her in direct contact with the effects of these challenges. It is the needs of the dependent children of the deployed service members that require the attention of legal assistance lawyers prior to and sometimes during deployments. As an overseas staff judge advocate, the hardest issues often involve the "problem" dependent son or daughter. Short of barring them from base or prosecuting them under the Military Extraterritorial Jurisdiction Act – the commanding officer will usually want more insight into why they are having difficulty. Other times the explanation of a dependent's behavior may provide insight in a courts-martial setting in either determining the motive for a crime or in extenuation and mitigation. Regardless of the setting, it will pay dividends for a judge advocate to invest time in understanding the researched analysis of the "military brat" culture.

Approximately two percent of the United States population grew up in a service-organization family such as the military and Foreign Service and have lived abroad. According to the 2000 Census, 576,367 Americans live outside the United States. This figure includes US military, federal civilian employees, and their respective dependents. The increase in numbers of Americans living abroad began after World War II when America extended its military, political, corporate

¹ Dr. Diana C. Noone, (B.A. in Political Science from Virginia Polytechnic Institute and State University 1987, J.D. from Widener University School of Law 1990, M.S.W. in Social Work from The Catholic University of America 1994, Ph.D. in Social Work from University of Maryland 2000) is a social science analyst at the National Institute of Justice and United States Department of Justice and an adjunct faculty member at the University of Maryland, Baltimore County. Dr. Noone was an associate attorney with Eckert, Seaman, Cherin and Mellott Law Firm in Pittsburgh, Pennsylvania where she practiced family and contract law. She has also worked with victims of child abuse, neglect, and sexual abuse and was the coordinator for a family preservation program for the State of Maryland. Dr. Noone has conducted research on diverse topics such as domestic violence, parenting education for incarcerated women, and trying juveniles in adult courts. In addition, she has worked as a victim advocate at the Women's Resource Center in Newport, Rhode Island. LCDR Gregory P. Noone, JAGC, USNR, and LT De Andrea Fuller, JAGC, USN edited this book review.

and humanitarian interests outside the United States. Early research focused on military children and the negative effects of military life. However, there has been an increase in the number of studies attempting to examine both the positive and negative effects of growing up in the military. In addition, research has begun to examine not just military children growing up in their non-passport country but also other families who are growing up abroad because their parents' work includes business, government, Foreign Service or missionary work. These children are often referred to as global nomads by themselves and researchers.

Military Brats and Other Global Nomads provides an important balanced presentation of empirical and theoretical research on both the positive and negative effects of growing up outside the United States in "organizational" families. The chapters provide useful information to researchers, policymakers and family advocates. Equally important is the insight it provides to judge advocates stationed overseas as they deal with a myriad of legal assistance, courts-martial, and various other related military dependent issues. The book illustrates the need to provide the necessary supports to "organizational" families including military families living abroad. In particular, the book provides a rare glimpse into the positive aspects of growing up abroad, which can help direct policy and programs for military families. Furthermore, individuals who grew up abroad in "organizational" families and/or are raising their own families overseas will find the book useful in reading about other individuals who had similar or shared experiences.

Part one examines the data on children and adults who grew up in military families. In the first chapter, Michelle L. Kelley explores the effect of military deployments on traditional and nontraditional military families. She primarily focuses on active-duty Navy mothers during their deployment and the effect on their children. She concludes that the experiences of many very young children and children of active-duty single mothers who are deployed are different than those of school-age children of intact families whose fathers are deployed. Young children with deployed mothers are more vulnerable to anxiety and sadness when their mothers are deployed. Furthermore, 12% of young children may experience clinical levels of depression. It appears that because of the age of the child, the child does not understand the cause of the departure or the length of time of the deployment. Furthermore, the child's response increased the level of separation anxiety for the mother, in particular the single Navy mother. This is a crucial finding because family supportive policies and practices are necessary to continue to recruit and retain highly skilled female military members with children. Because of shortages in manpower, increased military deployments at sea and changing gender roles, it is important for the military to understand the dynamics between male and female military parents and to respond accordingly. Some suggestions include: offering additional support for families and caregivers

experiencing separation anxiety; ensuring that crewmembers have access to computers and emails during deployment; providing time off for military parents without losing pay or vacation time for relocating children prior to and after deployment; providing information in pre-deployment briefings and material describing common responses of very young children; and helping children during this time by obtaining professional assistance.

Chapter two by Mary P. Tyler includes a study on the effects of a European tour on military adolescents. The results of Tyler's study indicate that most teens adjust well as long as they have strong support from family, school and the community. However, the utility of this chapter may be diminished somewhat by the fact that the most recent study was conducted in 1979 during the Cold War. Chapter three by Phoebe Price compares the behavior of civilian with military high school students in film theatres.

Chapter four written by Robert S. McKelvey provides a rare glance into the lives of Vietnamese Amerasians. He concludes that it is unfortunate that unlike the French, the United States waited eight years before beginning to reach out to Vietnamese children of American servicemen; it was 12 years before the Amerasian Homecoming Act passed. Tragically, most of these children were now in their adolescence and had been exposed to years of poverty, malnutrition and discrimination in Vietnam. However, despite the hardships the children endured in their early lives in Vietnam, they appear to be adjusting reasonably well to life in the United States. Most Amerasians are self-supporting, able to develop social networks, and are reasonably content with their lives in the United States. Few indicated they wished they were in Vietnam or hoped to return there, although they indicated they missed their families they left behind. However, the study also revealed that compared with other recent Vietnamese immigrants, Amerasians have lower levels of education and job training and were more likely to remain in unskilled entry level positions. This still begs the question of what might have been if the United States did not wait 12 years before bringing the Amerasian children and their mothers to the United States.

The last two chapters in Part One focus on findings from studies that explore adult children from military families. In chapter five, Karen Cachevki Williams and Lisa Marie Liebenow Mariglia focus on adults from military families who seek out one another through voluntary "Brat" organizations primarily on the Internet. The authors found several themes emerged from their research. One theme was that many individuals became members of "Brat" organizations in order to stay connected to their past, including friends and places that had been important to them. Another theme that emerged was the desire to make contacts with those who had similar military experiences. This study was interesting and timely because the number of individuals joining internet "Brat"

organizations continues to increase. These internet organizations can fulfill a need in their lives that civilian settings do not. The last chapter in Part One by Morten G. Ender provides results from an on-going study that goes beyond adolescence and explores the experiences of adult children from mostly military families. It is one of the largest samples from this population. Many of the adults who grew up in a military or organizational family believe that their experiences provided them an opportunity that many people do not have such as living in different places with different cultures all over the world. This can promote tolerance and resilience. The study also indicates that the global experiences for many of these adults have provided them with the skills for successful living in a continually diverse and ever expanding global world. However, for many of these adults their experiences abroad can also lead to feelings of rootlessness. Ender concludes that human service providers must recognize the diversity of organizational families especially as occupations and the economy become more global.

In Part Two, *Military Brats and Other Global Nomads* includes a compilation of chapters by some of the leading scholars on global nomads. The chapters discuss global nomads including the military but also experiences of families growing up in the Foreign Service and missionaries. In an extremely interesting chapter, Barbara F. Schaetti examines the attachment theory and its implications for the global nomad experience. The attachment theory generally means a relationship between an infant and the primary caregiver. The core belief is that all humans are motivated to maintain a balance between exploring the world and staying in close proximity to safety, which generally means to the primary caregiver. The attachment theory draws attention to many concerns when children are growing up as global nomads. These concerns include discontinuity in people, place, pets, and possessions; increased stress brought upon the attachment figures (primarily parents) at the time of the move; the risks and rewards of host nationals (nannies) taking on the role of primary caregivers; and when the repeated cycles of loss and grief are not recognized. This chapter is excellent in not only highlighting the concerns of children raised globally but also ways to address these concerns. Parents should recognize the need for attachment and the most important element for the development of a secure attachment is to be available for the child. Other techniques to help develop and/or maintain a secure attachment for the global nomad are open communication and consistency in family life; regular daily routines; predictable discipline and parenting; and shared family activities. Even though there are concerns with attachment due to the global move, the change also offers the chance for children to build adjustment and adaptation skills.

In chapter eight, Annika Hylmo examines the treatment of expatriate experience in children's literature. In the next chapter, Richard L.D. Pearce's discusses the developmental process in relation to children's international

relocation. His research is based upon a sample of 1,724 institutions in 174 countries in the International Schools. The sheer numbers in this study provide an examination that goes beyond just cultural-specific differences. However, in his final analysis he views the experience of the global child within the social context of both the family and culture.

Chapters 10 and 11 focus solely on adolescents. In chapter 10, Michael E. Gerner and Fred L. Perry, Jr. explore gender differences in cultural acceptance and career orientation among internationally mobile and non-mobile adolescents. Their study found that there is gender differences associated with international mobility during the adolescent years. Adolescents who live abroad rate themselves as more culturally accepting, more interested in travel, more open to learning other languages, and more interested in an international career in the future compared to American adolescents who have only lived in the US. However, females and males who are mobile differ when it comes to self-ratings. The experience of living abroad for females appears to make them more interested in pursuing an international career compared to their male counterparts. More importantly, the study found that when adolescents who have lived abroad return to the United States, many times they feel socially marginalized. However, for most adolescents this is temporary and short-term counseling and the understanding of teachers and parents can counter this. However, it is an issue that is often overlooked by individuals involved in helping the family return to the United States. In chapter 11, Annika Hylmo writes another article for this book and examines expatriates adolescents representing countries other than the United States. She provides a rare glimpse into “other” expatriate adolescents.

The final chapter in the book by Ann Baker Cottrell explores the educational and occupational choices of children who spend all or part of their formative years in a third culture environment. She affirms that living in a third culture environment has an important and life-long impact on these individuals. Many feel different from other Americans and believe it has positively benefited them. However, few follow their parents into the same professions; yet, the influence of their parents work is evident because many of their careers are as professionals, administrators, and careers in service. Interestingly, many of them have also incorporated an international dimension into their higher education and work roles.

Readers of *Military Brats and Other Global Nomads*, especially those interested in programs and policy for this population, will find a series of useful recommendations and conclusions throughout the chapters. The judge advocate will find the book helpful in understanding the experience of not only military children and adolescents but also adults. The information provided in this book will enable the judge advocate to better inform and counsel this population. This

book contains some excellent chapters, in particular, chapters one and seven that provide illuminating information for military judge advocates, policymakers and practitioners to gain a better understanding of the challenges this population faces.